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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MATTHEW STARK and MARCIA NEELY,
Petitioners,

v.

INDEPENDENT SCHOOL DISTRICT NO. 640,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is a violation of the Establishment Clause for a public school district to establish and operate an elementary school in a joint venture with a religious sect in a building owned by a sect member with its curriculum modified to conform to the sect's religious objections to the use of modern technological devices and whose student body consists exclusively of sect members.

PARTIES TO THIS PROCEEDING

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There are no parent companies or wholly owned subsidiaries of any party to be listed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Matthew Stark and Marcia Neely respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Eighth Circuit (App. A) are reported at 123 F.3d 1068 (8th Cir. 1997). The order and opinion of the United States District Court for the District of Minnesota (App. B) is reported at 938 F. Supp. 544 (D. Minn. 1996). The order denying the petition for rehearing and suggestion for rehearing en banc (App. C) is unpublished.

JURISDICTION

The decision of the Court of Appeals was filed on August 21, 1997. The order of the court of appeals denying the timely filed petition for rehearing and suggestion for rehearing en banc was filed on November 24, 1997. This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

Minn. Stat. § 126.669 (1993), cited by the court of appeals, is reprinted in Appendix G.

STATEMENT OF THE CASE

This case raises important questions about the constitutionality of a religiously-segregated public school that was opened for the express purpose of operating in accordance with a religious group's curriculum objections.

A. The Undisputed Facts Material To This Court's Consideration Of The Question Presented.

Independent School District 640 (the "School District") is a rural School District in Minnesota. The district includes the towns of Wabasso and Vesta. The School District operated elementary schools in both towns until 1984 when it closed the Vesta school. Thereafter, Vesta children attended the Wabasso school 14 miles away. The Brethren are a Christian religious sect who compromise about one third of the population of Vesta. The Brethren hold a sincere religious objection to the use of technological devices such as computers, televisions, films, and

audio recordings. See *Ware v. Valley Stream High School Dist.*, 550 N.E.2d 420, 424 (N.Y. 1989). Brethren also practice separatist beliefs against socializing with non-Brethren, especially with respect to eating meals with non-Brethren.

The use of modern technology is a prevalent part of the School District curriculum and is used at the Wabasso school as a means to train children to live and work in modern society. Computers are used in every classroom in Wabasso, and a separate computer lab is also regularly used. When Brethren children formerly attended the Wabasso elementary school, the School District accommodated their religious beliefs and excused them from participating in classes and activities that used modern technology.

A member of the Brethren, Lloyd Paskewitz, purchased the former elementary school building in Vesta. In August 1992, he sent a letter (App. D) to the School District, requesting the re-opening of a school in Vesta for Brethren children and offering the School District rent-free use of the former school building in exchange for a ban on modern technological equipment that conflicted with Brethren beliefs. The School District responded favorably to Paskewitz's letter and by February, 1993, the re-opening of the Vesta school was essentially approved. On June 1, 1993, Paskewitz provided the School District with a letter containing the names of all of the 19 Brethren children who would be attending the Vesta school. All of those children and no one else attended the Vesta school in the fall, and the Paskewitz letter was given by the superintendent to the teacher as the class list. No non-Brethren parent was given a choice of attending the Vesta School.[1]

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[1] A letter that the School District claims solicited non-Brethren to consider attending the Vesta school does not, in fact, refer to the Vesta school, but instead refers to creation of a multi-age classroom in Wabasso. Bates Affidavit, Ex. H.

The Vesta school was reopened in the fall of 1993 pursuant to a formal contract establishing a joint venture between the School District, Paskewitz and the "Brethren." In that contract (App. E), the School District agreed to provide a teacher and books and limit the use of technology in the curriculum, in exchange for free rent and the Brethren's agreement not to home-school their children and thereby cause the consequent loss of state per-pupil aid; the Brethren and Paskewitz also agreed to provide building maintenance, security, insurance, and real estate taxes. In addition, the parties agreed that special education, health, gym and music classes would not be provided, and students wanting these classes would be educated in Wabasso. The School District admits, as Superintendent Bates testified, that the deletion of technology and media at the Vesta School was due solely to the request of the Brethren, and was not based on any determination or evidence that there is any educational benefit to deleting technology and media.

It is undisputed in the record that throughout the Vesta school's operation, Brethren children have made up 100% of the enrollment. All non-Brethren children in Vesta and elsewhere in the School District have continued to attend school in Wabasso. Plaintiff Neely testified that one of the Vesta school teachers told her that she had as many students as she could handle and that non-Brethren have been discouraged from attending.

B. Proceedings Below.

After the close of discovery, the parties filed cross motions for summary judgment. The district court ruled that "the facts presented by this case provide a clear example of state sponsorship, or the advancement, of a religion which violates the mandates of the First Amendment." *Stark v. Independent School District No. 640,* 938 F. Supp. 544, 550 (D. Minn. 1996). The court therefore granted summary judgment to plaintiffs and enjoined the

School District's operation of an elementary school in Vesta, Minnesota in accordance with the Brethren's religious objections to the use of computers, films, televisions, audio recordings and other technology. *Id.* at 554-55.

The district court based its decision on the well-established constitutional prohibition against the tailoring of curricula to satisfy the principles or proscriptions of any religion. *Epperson v. Arkansas,* 393 U.S. 97 (1968) (striking down Arkansas statute prohibiting the teaching of evolution); *Edwards v. Aguillard,* 482 U.S. 578, 593 (1987) (striking down creationism act because its "purpose . . . was to restructure the science curriculum to conform with a particular religious viewpoint"). The district court found that religious ideology determined the curriculum. The district court also based its decision on the documented and reasonable perception in the community that the Vesta school is a Brethren school. 938 F. Supp. at 552. The court found it significant that though the school is theoretically open to all children, only Brethren children have attended. The court further found that the enrollment was determined by religious affiliation because the segregated Vesta school population was not the result of geography or a random feature. All non-Brethren Vesta children have continued to travel 14 miles each way to school in Wabasso.

A divided panel of the court of appeals reversed the district court's entry of summary judgment for plaintiffs, and remanded for entry of summary judgment in favor of the School District. The panel majority found the opening and operation of the Vesta school constitutional under *Lemon v. Kurzman,* 403 U.S. 602, 612-13 (1971); and *Board of Education of Kiryas Joel Village School District v. Grumet,* 512 U.S. 687 (1994).

The panel majority did not attempt to locate a secular purpose for the deletion of technology, but instead found that the opening of the Vesta school was justified by the

secular reasons of space efficiency, savings in transportation costs [2] and avoiding the loss of state aid if the Brethren opted for home schooling. None of the reasons relied upon by the panel majority were found in any contemporaneous record of the school district's decision; instead, they are found only in the affidavits of the school district submitted in this litigation.

The panel majority found that the opening and operation of the Vesta school did not advance or endorse the Brethren's religious beliefs analogizing this case to those involving the neutral provision of government services. The majority cited such cases as *Rosenberger v. Rector and Visitors of the Univ. of Virginia,* 515 U.S. 819 (1995), and *Zobrest v. Catalina Foothills School Dist.,* 509 U.S. 1 (1993). The majority did not address the community perception of the Vesta school as a Brethren school or attempt to identify a secular reason for the segregation of the Vesta school along religious lines, other than to state that the Vesta school is open to all and there is no evidence that non-Brethren students wishing to attend have been turned away. The panel majority found "little significance in the fact that [the Brethren] are a party to the lease" agreement with the School District. App. at 4a n.7.

The panel majority also found that the School District had not advanced or endorsed the Brethren's religious beliefs or singled the Brethren out for a special benefit in violation of *Kiryas Joel,* opining that the School District grants all parental requests for curriculum exemptions pursuant to Minn. Stat. § 126.699 and/or claimed district policy. The panel majority did not address Judge Murphy's observation in dissent that the School District's claimed reliance on Minn. Stat. § 126.699 could not be true "because the district approved the proposal from the

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[2] This purpose is furthered only if those who attend the Vesta school do not wish transportation to Wabasso for computer and technology instruction. Accordingly, the benefit is tied to the Brethren.

Brethren to reopen the school in February 1993 and . . . § 126.699 was not passed until May 1993." App. at 23a, n.9.

For this and other reasons, Judge Murphy concluded that the establishment and operation of the Vesta school was unconstitutional under *Epperson, Edwards, Lemon,* and *Kiryas Joel.* She found that the Vesta school lacked a secular purpose because the School District contracted with a religious group to limit the use of technology, not for pedagogical reasons, but to match the tenets of a religious group and secure state aid controlled by the Brethren's attendance at a public school. She also found that the opening and operation of the Vesta school resulted in an endorsement of the Brethren's beliefs because, based on clear evidence that both Brethren and non-Brethren consider the Vesta school to be a Brethren school. This local perception also explained the complete segregation of the Vesta school along religious lines. Finally, Judge Murphy found that, like the legislature in *Kiryas Joel,* the School District impermissibly singled out the Brethren for a special benefit because there is no guarantee that the next religious group could obtain a special school for its members with a publicly-funded school teacher teaching a modified curriculum in accordance with the sect's religious beliefs.

On November 24, 1997, a divided court of appeals denied plaintiffs' petition for rehearing and suggestion for rehearing en banc. In addition to Judge Murphy, Chief Judge Arnold and Judge McMillian voted to rehear the case en banc.

REASONS FOR GRANTING THE WRIT

Review is warranted for three reasons.

First, the Eighth Circuit's decision that the School District may constitutionally operate an elementary school with a curriculum modified to conform to Brethren re-

ligious objections to modern technology is contrary to the otherwise unanimous view of lower federal courts that this Court's decisions in *Epperson* and *Edwards* prohibit the tailoring of public schol curricula for religious believers to satisfy their religious objections to curricula components. *Epperson* and *Edwards* addressed the tailoring of school curricula for all students in a state, whereas this case and several others address parental requests for tailoring the curricula of a particular school or course to conform to their religious beliefs. The recurring nature of such requests and the conflict now created as to whether a public school's granting of such requests is an Establishment Clause violation warrant this Court's review.

Second, the Eighth Circuit's decision sanctioning the opening and operation of an elementary school as a joint enterprise with the Brethren, attended only by Brethren children in a building owned by a Brethren member, with a curriculum conformed to Brethren objections to modern technology, is fundamentally at odds with this Court's decision in *Kiryas Joel* prohibiting the use of religious criteria to accomplish segregation. The court of appeals decision is also contrary to *Kiryas Joel's* prohibition on singling out of a particular religious group for a special benefit. A fundamental constitutional problem with the School District's ad hoc establishment of the Vesta school is the lack of neutrality, i.e. a guarantee that other religious and nonreligious groups will be treated similarly when they seek the operation of a school in accordance with their objections to secular curriculum items.

Third, even if groups of other religious believers could count on receiving treatment equal with the Brethren, the Eighth Circuit's decision approves the balkanization of public schools along religious lines and the undermining of cohesion that is a historical hallmark and goal of the American public school. These consequences should not be endured by children who live in the Eighth Circuit or

elsewhere in school districts that will rely on the Eighth Circuit's opinion for guidance in the absence of constitutional certainty that only this Court can provide.

I. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT AND LOWER FEDERAL COURTS ADDRESSING THE CONSTITUTIONALITY OF PUBLIC SCHOOL CURRICULA OR PROGRAMS THAT ARE MODIFIED OR ESTABLISHED FOR THE EXPRESS PURPOSE OF CONFORMING TO RELIGIOUS OBJECTIONS OR BELIEFS.

This Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). This Court has established a rule, heretofore unquestioned, that the First Amendment does not permit a school district to tailor its curriculum "to the principles or prohibitions of any religious sect or dogma." *Epperson*, 393 U.S. at 271; *Edwards*, 482 U.S. at 590-91. The trial court below relied upon these precedents when it found that the technology-free Vesta school was created for the express purpose of "conform[ing] to the religious beliefs of the Brethren," and accordingly held the school unconstitutional. App. at 44a. By ignoring the principle established by this Court, the court of appeals decision is in direct conflict with *Epperson* and *Edwards*.

The court of appeals decision also conflicts with the holdings of other lower federal courts. Relying on *Epperson*, *Edwards* and *Lemon*, the lower federal courts had heretofore been vigilant in policing attempts to modify school curricula and practices for religious believers to conform to their religious objections and beliefs. For example, in *Parents Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986), the court found unconstitutional New York City's plan to tailor remedial education to Hasidic beliefs in order to induce parents of female

Hasidic Jews to send their children to a public school. 803 F.2d at 1237. The City had agreed to establish separate classrooms in a public school for the Hasidic girls in which only they would be taught, to partition the school so the Hasidic girls would have their own entrance and would not come across other students, to teach the classes in Yiddish, to ensure that the Hasidic girls did not have contact with boys, and to teach the girls only with female teachers. *Id.* at 1237. The court stated that "[t]he lengths to which the City has gone to cater to these religious views . . . are plainly likely to be perceived by the Hasidim and others, as governmental support for the separatist tenets of the Hasidic faith." *Id.* at 1241.[3]

Similarly, in *Bollenbach v. Board of Education*, 659 F.Supp. 1450, 1464-65 (S.D. N.Y. 1987), the court held unconstitutional a school district's agreement with a religiously-based request to use only male bus drivers to transport Hasidic Jewish male students. *Id.* at 1464-65 ("The District's use of male drivers would effectively transform this neutral [bus] service into a vehicle for promoting the Hisadic tenet that boys must not be in contact with women."). The *Bollenbach* decision, built on the Second Circuit holding in *Quinones*, is in direct conflict with the panel decision below. Unable to distinguish

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[3] The Second Circuit's endorsement approach to the second prong of the *Lemon* test is consistent with *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 595 (1989) (effect of the créche display depends on what viewers may fairly understand to be its purpose); and *Witters v. Washington Dept. of Services, etc.*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring) (effect must be judged according to standard of a "reasonable observer"). In her dissent, Judge Murphy also relied on *Allegheny* in finding an impermissible governmental endorsement of the Brethren's religious beliefs. The panel majority attempted to distinguish *Quinones*, not by addressing the community perception of the Vesta school as a Brethren school and whether that reasonable perception indicated endorsement of Brethren's beliefs, but by comparing the segregation at the Vesta school, which it found to be de facto, with the de jure segregation in *Quinones*.

Bollenbach, the panel majority did not address that case or account for its favorable citation in *Pulido v. Cavazos*, 934 F.2d 912, 921 (8th Cir. 1991), where it was cited with approval and described as finding that the deployment of "only male bus drivers on bus routes would have the primary effect of advancing Hasidic religion."

The panel decision is also at odds with the interpretations of *Epperson* and *Edwards* by all other circuits which have addressed the issue. The Sixth Circuit found in *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1064 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1029 (1988), that creation of alternative programs for the children of religious believers to conform to their objections to the normal curriculum would be an unconstitutional establishment of religion. (citing *Epperson*). Likewise, the Fourth Circuit has affirmed a district court's conclusion that "Maryland is not required to 'subsidize' . . . particular religious beliefs by eliminating contrary viewpoints from the required currciulum," and that "Maryland is prohibited from doing so by the Establishment Clause of the First Amendment." *Battles v. Anne Arundel County Bd. of Educ.*, 904 F.Supp. 471, 477 (D. Md. 1995) (citing *Edwards*), *aff'd* 95 F.3d 41 (4th Cir. 1996). A district court in Utah denied a student's request for court-ordered removal of choral songs that violate her religious beliefs, stating that "the Supreme Court has held that for a school to tailor its curriculum to satisfy the principles or prohibitions of any religion would violate the Establishment Clause." *Bauchman v. West High*, 900 F.Supp. 254, 276 n.22 (D. Utah 1995) (citing *Epperson*), *aff'd* 132 F.3d 542 (10th Cir. 1997).

Most recently, the Tenth Circuit has stated "there is a real possibility" that a requested religious exemption to a school district's full-time attendance policy for the purpose of home-schooling on subjects where the school's presentation is religiously objectionable would be unconstitutional under *Kiryas Joel*. *Swanson v. Guthrie Inde-*

pendent School District No. 1-L, —— F.3d ——, 1998 Westlaw # 31743, *7 n.7 (10th Cir. 1998). *Swanson* is also notable for plaintiffs' recognition of the rule against curriculum modifications to conform to religious objections. Indeed, plaintiffs there "maintain that they do not wish to alter the curriculum offered by the Defendants," they only want to home-school their children on subject where the curriculum offends their religious beliefs. *Id.* at *6.

The panel majority's decision in this case conflicts with the decisions of this Court and the approach embraced by all other lower federal courts. Supreme Court review is necessary to resolve that conflict.

II. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH THE NEUTRALITY PRINCIPLE FOUND IN THIS COURT'S DECISION IN *KIRYAS JOEL*.

As this Court emphasized in *Kiryas Joel*, a "fundamental source of constitutional concern" is that a government body "may fail to exercise [its] authority in a religiously neutral way." *Kiryas Joel*, 512 U.S. at 703. *Accord Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995). The singling out of one religious group or community for special treatment violates this command, as does the awarding of special benefits based on religious criteria. *Agostini v. Felton*, —— U.S. ——, 117 S.Ct. 1997, 2016 (1997). *Accord Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring in judgment). In *Kiryas Joel*, 512 U.S. at 702-05 (majority opinion Part II-B), the Court held that the legislatures creation of a school district based on the religious affiliation of community residents was unconstitutional because it used religious criteria to establish boundaries and it impermissibly singled out a particular group for special treatment.

As Judge Murphy correctly found in dissent, the School District's agreement with the Brethren to operate a school

that conforms to Brethren religious objections to modern technology reflects the same defect, born of the ad-hoc exercise of power based on religious criteria. As in *Kiryas Joel*, the benefits here "flow only to a single sect." *Id.* at 705.[4] Moreover, there is no assurance that when other religious groups make similar requests that the School District will agree to open and operate a public school for them. The assumption that the School District will grant all future requests, relied on by the majority, is belied by the School District's ad hoc decisionmaking process. Regardless, this Court has held that it cannot rely on such unsupported assurances. *Id.* at 696.

The decisions of this Court in *Zobrest, supra, Witters v. Wash. Dept. of Servs. for Blind*, 474 U.S. 481 (1986), *Mueller v. Allen*, 463 U.S. 388 (1983), and others have upheld government provision of educational services and aid, even to religious institutions, because the programs were "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Witters, supra*, at 487 (quoting *Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)). Similarly in *Zobrest*, neutral benefits provided to a broad class of students without regard to the religious nature of the school did not offend the Establishment Clause. *Id.*, at 10. What distinguishes this case from those relied upon by the panel majority is that the benefit of the Vesta school is directed at the children of one religion, and the public school's curriculum is conformed to one religious ideology.

In *Kiryas Joel*, Justice Souter found strong evidence of the school district's unconstitutionality in the fact that religion, and not geographic or historic criteria, was the explanation for the school district's organization and seg-

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[4] This is especially true because non-Brethren parents were not solicited for their interest in sending their children to school in Vesta or given any choice as to which curriculum items and teaching methods would be used at the Vesta school.

regated student population. *Id.*, 512 U.S. at 701-02, nn. 5-6. He noted that a different case is presented when "boundaries are derived according to neutral historical and geographic criteria, but whose population happens to comprise coreligionists." *Id.* at n.6. Similarly, Justice Kennedy found that regardless whether the intent is to accommodate and regardless whether government provides "similar gerrymanders to people of all religious faiths, the Establishment Clause forbids the government from using religion as a line drawing criterion." *Id.*, at 729. Therefore, according to Kennedy, it may not segregate on the basis of religion. *Id.*

In this case, the panel majority ignored the trial court's finding that the religious segregation in the Vesta school was "not the result of a random feature or of a geographical function," App. at 46a, and it closed its eyes to the written agreement favoring the Brethren. App. at 4a, n.7. It offered no non-religious explanation for the fact that the Vesta school has always been attended solely by Brethren, and that all non-Brethren children who live in Vesta or closer to Vesta than Wabasso continue to be bussed to Wabasso for school. That complete segregation is compelling evidence of the Vesta school's lack of secular purpose and effect.

Review is necessary to bring this case in accord with the neutrality principle which is the touchstone of Establishment Clause jurisprudence, as this Court found in *Kiryas Joel.*

III. THE EIGHTH CIRCUIT'S DECISION THREATENS THE HISTORIC ROLE OF THE AMERICAN PUBLIC SCHOOL AS A DEMOCRATIZING INSTITUTION.

"The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to

avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring). "[T]he avoidance of religious divisiveness is nowhere more important than in public education,' and segregation along religious lines "is inconsistent with the public schools' compelling interest in 'promoting cohesion among a heterogeneous democratic people.'" *Mozert v. Hawkins*, 827 F.2d 1058 (6th Cir. 1987) (Kennedy, J., concurring), quoting *Illinois ex rel. McCollum*, 333 U.S. at 231 (Frankfurter, J., concurring).

The panel majority's decision is the first decision in the country to sanction the operation of a religiously-segregated public school that cannot be explained by coincidence, geography or some other secular purpose. If allowed to stand, there is a serious risk that the decision will foster the balkanization of public schools along religious lines, with curricula conformed to delete material that is religiously objectionable. That reality, which now exists in at least one rural Minnesota school district, approved by the decision of the Eighth Circuit, is inconsistent with this Court's and this country's historic vision of the public school. The constitutionality of this important new reality should be reviewed by this Court.

CONCLUSION

This Court should grant certiorari in this case to delineate the constitutional limits on a school district's exercise of authority to modify its curriculum to conform to religious precepts, to address the provision of special educational benefits to a group of religious believers, and to correct the serious misstep taken by the Eighth Circuit to foster religious separatism in the public schools. The decision below is inconsistent with prior decisions of this Court and with the decisions of other circuits and district courts, and the issues are of sufficient public importance and recurring nature as to warrant the granting of certiorari.

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Dated: February 23, 1998

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3250

MATTHEW STARK, MARCIA NEELY,
Plaintiffs/Appellees,

v.

INDEPENDENT SCHOOL DISTRICT, No. 640, and the members of its Board of Directors,
Defendant/Appellant,

LEON PLAETZ, CURTIS TROST, SCOTT FREDERICKSON, TOM FRANTA, BARB BERANEK, ALOIS GUETTER,
Defendants.

JEFF PASKEWITZ, MAVIS PASKEWITZ, STUART PASKEWITZ, BEN PASKEWITZ, RON PASKEWITZ, NAOMI PASKEWITZ, CARRIE PASKEWITZ, JOE PASKEWITZ, GORDON BARBER, TWYLA BARBER, PETER BARBER, CINDY LOGAN, SHELDON LOGAN, JOANNA LOGAN, CLAYTON PASKEWITZ, LINDA PASKEWITZ, TRISHA PASKEWITZ, MINNESOTA EDUCATION ASSOCIATION, MINNESOTA FEDERATION OF TEACHERS,
Amicus Curiae.

Appeal from the United States District Court
for the District of Minnesota

Submitted: November 20, 1996
Filed: August 21, 1997

Before WOLLMAN, BEAM, and MURPHY, Circuit Judges.

WOLLMAN, Circuit Judge.

This is an appeal from an injunction enjoining the operation of a public school. We reverse and remand with directions to dismiss the complaint.

Factual Background

Independent School District No. 640 (the district) is a rural school district located in southwestern Minnesota. It covers approximately 225 square miles of agricultural land, including the towns of Wabasso and Vesta. The district operated elementary schools in both Wabasso and Vesta until the 1983-84 school year. It closed the Vesta elementary school and sold the building in May 1984. Thereafter, the Vesta children attended the Wabasso school, which is approximately fourteen miles from Vesta.

Lloyd Paskewitz bought the old Vesta elementary school building in 1991. Paskewitz and several other Vesta families are members of a religious group known as the Brethren, a group that originated in Dublin, Ireland, in the late 1820s.[1] *See* Bryan Ronald Wilson, *"The Brethren" A Recent Sociological Study* (1981). (Appellees' App. Ex. W.) It is undisputed that the Brethren have a sincerely held religious belief in avoiding the use of technology, including televisions, radios, videos, films, and computers.

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[1] Paskewitz estimated that approximately 115 of the 300 people living in Vesta as members of the Brethren.

In August 1992, Paskewitz, on behalf of several of the Vesta Brethren families, wrote to Dr. George Bates, the district's superintendent, about the possibility of reopening the Vesta elementary school in the form of a multi-age classroom. Paskewitz offered to lease space in the old school to the district in consideration of the district's providing a teacher and supplies. Pasketwitz's letter stated, "[w]e would have no objection to it being a public school," but requested that "the charter of the school in Vesta" contain a clause stating "[t]hat no T.V., Radios, Videos, and Computers be used." Paskewitz stated that there were approximately twenty-one Brethren children that would be interested in attending and that the group had heard that other, non-Brethren children might be interested in attending the Vesta school. Paskewitz's letter also noted that the Brethren children would not require transportation or school lunches, as the children could walk to school and would go home for lunch in accordance with their religious beliefs.

Dr. Bates attested that he considered the feasibility of opening a multi-age classroom in Vesta. He stated that the primary benefits of such a classroom included the reduction in the number of students being bussed to Wabasso, the availability of an additional multi-age classroom, the reduction in class sizes in grade-specific classrooms, and the alleviation of space shortage in the Wabasso building. He noted that the relative costs of the proposed classroom were minimal. After holding public meetings, the school board unanimously approved the proposal. Members of the school board attested that they approved the opening of the Vesta school for several reasons, most of which were financial. Opening the Vesta school would prevent the Brethren children from possibly being home-schooled, which would have meant a loss in state aid of roughly $3,200 for each student withdrawn from school. A Vesta school eliminated the need to bus Vesta students to Wabasso, and it was more economical to send one teacher to Vesta than to bus Vesta children to Wabasso. Additionally, opening a multi-age classroom in Vesta would

provide educational benefits for those students who otherwise might have been home-schooled. Dr. Bates and the school board members attested that during the approval process they did not discuss the religious backgrounds of the parents or students who might attend the Vesta school, nor were those religious backgrounds relevant to their decision.

A three-year lease was signed on October 12, 1993, by the district, Paskewitz, and the Brethren.[2] The lease provided that the Vesta school would be operated by the district in the form of a multi-stage classroom and would be "a public school for any resident student in the School District." The district would provide teachers and administrative services, establish the curriculum "in compliance with state laws and rules," and provide classroom materials for instruction. The parents of the Brethren children would "have the right to comment on and provide input regarding" classroom materials "to the extent as other parents in the School District," but the district retained "the sole discretion" regarding "final approval" of textbooks and instructional materials. The lease provided that "[t]he School District shall, to the extent permitted under applicable law and rules and regulations . . . limit the use of technology such as television, radio, and/or video recordings, computers and movies in the classrooms at the school." The district would provide education, certain federally funded educational services, and counseling services, as well as instruction in health, physical education, and music at the Wabasso School to any Vesta students needing them.[3] The lease stated that "[a]ll

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[2] Although the "Brethern" [sic] was an additional party to the lease, the person who signed the lease allegedly on the Brethren's behalf has attested that he had no authority to do so. Furthermore, there is no evidence in the record that the Brethren had any ownership interest in the Vesta school building. Thus, we find little significance in the fact that they are a party to the lease.

[3] The lease stated that hot lunch would also be provided at the Wabasso school, but the district has said that it would cater hot lunches to students at the Vesta school if needed.

policies adopted by the [School District] . . . shall apply at the [Vesta] school." Paskewitz and the Brethren agreed to pay all utilities, provide custodial services, repair and maintain the building and grounds, pay property taxes, provide property and liability insurance related to the building, and remove snow.

The district planned to operate three multi-age classrooms during the 1993-94 school year, two in Wabasso and one in Vesta. The district solicited students for these classrooms, and fifty-four students signed up and were allowed to request which school they wished to attend. Thirty-five chose the Wabasso school, and the remaining nineteen chose the Vesta school. Eleven parents of twenty-nine current or former Vesta students attested that they preferred sending their children to the Vesta school rather than the Wabasso school because they liked the convenience of having their children attend a school within walking distance and having their children come home for lunch. They also preferred the multi-age Vesta classroom to a grade-specific one in Wabasso.[4] Although the Vesta school is open to any student in the district who wishes to attend there, apparently only Brethren children have attended the Vesta school since it opened.

Dr. Bates and the two Vesta teachers attested that the same elementary curriculum is taught at the Vesta school as is taught at the Wabasso school. Technology, in the form of computer instruction, is a standard part of that curriculum for each grade level. The teachers testified that when the Vesta school first opened, students wishing computer instruction would have been bussed to the Wabasso school to receive it. Both attested that the district now provides computer and audio/visual equipment to them at the Vesta school upon request. Although technogoly is available to all students, both teachers testified

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[4] The multi-age classrooms in Wabasso were open only for the 1993-94 school year.

that they do not regularly use technology in their classroom instruction.

Minnesota law requires school districts to establish a procedure that allows parents to review the content of instructional materials provided to a minor child. If the parent objects to that content, the district must make reasonable arrangements for alternative instruction. *See* Minn. Stat. Ann. § 126.699 (West 1994). The district's policy allows students with religious objections to be excused from objectionable class or activities. If the class or activity is a required one "suitable alternative activities shall be provided." Dr. Bates attested that the district has received numerous objections to various activities, including the use of computer technology, drug education, self-esteem training, certain books and audio and visual presentations, and sex education; that the district does not inquire into the motivations for a parent's objections; and that the district provides alternative instruction.

All of the Brethren parents have objected to the use of computers at the Vesta school and have asked for alternative instruction for their children, which has been provided. Accordingly, the educational curriculum at the Vesta school does not include the use of computers, videos, films, or audio presentations. While the Brethren children were attending the Wabasso school prior to the reopening of the Vesta school, the district accommodated their religious objections and allowed them to avoid participating in the use of technology.[5] It is undisputed that, in light of the accommodations the district would make at the Wabasso school for the Brethren children, the Brethren children have received exactly the same education at the Vesta school that they would have received if they had continued to attend the Wabasso school. It is also undisputed

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[5] The district also supplied the Brethren children with a separate lunch table at the Wabasso school.

that no religious instruction has taken place at the Vesta school and that no religious artifacts are present.

Procedural History

Matthew Stark and Marcia Neely are Minnesota citizens utilizing taxpayer standing who filed suit against the district [6] seeking a declaratory judgment that the creation and operation of the Vesta school violates the Establishment Clause of the First Amendment to the United States Constitution and article 1 section 16 of the Minnesota Constitution. They also sought an injunction prohibiting the district from operating the Vesta school in conformance with Brethren beliefs, a judgment requiring the district to refund to the State of Minnesota all state aid the district received for children attending the Vesta school, and an award of attorney fees.

The case was submitted to the district court on cross-motions for summary judgment. The court concluded that "the facts presented by this case provide a clear example of state sponsorship, or the advancement of a religion which violates the mandates of the First Amendment." The court concluded that the district had modified the Vesta school's curriculum "based solely on the request of a religious group."

The district court further concluded that the primary effect of the opening of the Vesta school was that of promoting religion; that "the opening, and the manner of operation of, the Vesta school lacks a secular purpose and was done to conform to the religious beliefs of the Brethren"; and that the district had thus created "an impermissible identification of its powers and duties with the religious beliefs of the Brethren." The court entered an injunction permanently enjoining the district "from

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[6] The plaintiffs also sued members of the school board, Paskewitz, and the Brethren. These defendants were dismissed at various times, and their dismissals are not raised on appeal.

operating the Vesta School or any other school in conformance with the Brethren's religious objections to the use of computers and other technology and media." The court did not rule on the refunding of state aid money or on the matter of attorney fees.

Following the district court's denial of the district's motion for a stay pending appeal, we entered an order staying the district court's injunction. Stark and Neely have moved to dissolve the stay. Stark and Neely have dismissed their refund claim, and their claim for attorney fees has been stayed pending the outcome of this appeal.

First Amendment

We begin by noting that the decision by the district to open a school and to accommodate parental requests for exemption from aspects of the district's chosen curriculum falls within the heartland of the "comprehensive powers and substantial discretion" that are generally afforded to school districts in "discharg[ing] the important tasks entrusted to them." *Pratt v. Independent Sch. Dist. No. 831*, 670 F.2d 771, 775 (8th Cir. 1982). *See Wisconsin v. Yoder*, 406 U.S. 205, 235 (1972) ("[C]ourts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education."). Despite this considerable discretion, courts have recognized that school boards must exercise their powers " 'in a manner that comports with the transcendent imperatives of the First Amendment,' " and courts "have been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) (quoting *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982)).

As the Supreme Court has stated, courts "do not . . . intervene in the resolution of conflicts which arise in the

daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). *Cf. Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2448 (1995) (plurality opinion) "[O]utsiders or individual members of the community uninformed about the school's practice . . . *might* leap to the erroneous conclusion of state endorsement.").

A.

The applicable test for evaluating whether state action has violated the Establishment Clause is that established by *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 389 n.7 (1993) ("*Lemon*, however frightening it may be to some, has not been overruled."). "In order to satisfy the *Lemon* test, a challenged governmental action must (1) have a secular purpose, (2) not have the primary or principal effect of advancing religion, and (3) not foster an excessive entanglement with religion." *Good News/Good Sports Club v. School Dist. of Ladue*, 28 F.3d 1501, 1508 (8th Cir. 1994) (footnote omitted) (citing *Lemon*, 403 U.S. at 612-13). *See also Agostini v. Felton*, Nos. 96-552 & 96-553, 1997 WL 338583, at *19 (U.S. June 23, 1997) ("Thus, it is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect.").

The decision to open a school in Vesta furthers the valid secular purpose of educating the district's children. *See Mueller v. Allen*, 463 U.S. 388, 395 (1983) (state has "secular purpose of ensuring that the State's citizenry is well educated"); *Wolman v. Walter*, 433 U.S. 229, 240 (1977) ("There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education."); *Everson v.*

Board of Educ. of Ewing Tp., 330 U.S. 1, 7 (1947) ("It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose."). The district's decision to open the school in Vesta was based upon the secular reasons of space efficiency, savings in transportation costs, and the addition of a multi-age classroom and corresponding reduction in class sizes. Further, the decision forestalled the plans of certain parents to home-school their children and thus prevented a reduction in the amount of state aid flowing to the district, funding that benefits all students within the district.

Relying primarily on *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), and *Parents Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986), the district court concluded that the primary effect of the district's decision to open the school at Vesta was to promote religion. The court noted that the Vesta school is perceived as a Brethren school and that the district had thus "create[d] an impermissible identification of its powers and duties with the religious beliefs of the Brethren."

Quinones involved a plan to educate Hasidic Jewish girls at a public school by physically separating a group of classrooms from the rest of the school and dedicating them for their use, and providing only female public school teachers who would teach primarily in Yiddish, with English taught as a second language. *See Quinones*, 803 F.2d at 1237. The Second Circuit concluded that this plan created "a symbolic link between the state and the Hasidic sect" which appeared to endorse the separatist religious views of the Hasidic Jews and that the plan thus failed the primary effect test. *See id.* at 1241-42.

This case is distinguishable because the Vesta school does not involve the complete segregation and dedication of part or all of a public facility to a group of students for religious reasons as in *Quinones*. That portion of

Grand Rapids on which the district court relied has now been overruled. *See Agostini*, 1997 WL 338583, at **16, 21.

The Vesta school is a public school open to all, and there is no evidence that any students wishing to attend there have been turned away. Further, that the school board's decision to open the Vesta school coincided with certain parents' desire to see a public school opened in Vesta does not compel a finding that the primary effect of the decision was to advance religion or that the district was sending a message of approval or disapproval of individual religious choices. *See Clayton by Clayton v. Place*, 884 F.2d 376, 380 (8th Cir. 1989) ("The mere fact a governmental body takes action that coincides with the . . . desires of a particular religious group . . . does not transform the action into an impermissible establishment of religion."). Any incidental benefits to the Brethren's religious beliefs are secondary to the primary effect of providing an additional school for the secular education of Vesta children. *Cf. Good News/Good Sports Club*, 28 F.3d at 1508 (incidental benefits to religion from policy of allowing group access to school property were secondary to primary effect of providing neutral forum for exchange of ideas).

Although a district may not modify its curriculum to conform to a set of sectarian beliefs, *see Edwards v. Aguillard*, 482 U.S. at 593; *Epperson v. Arkansas*, 393 U.S. at 106; *Pratt*, 670 F.2d at 776-79 (removal of film from curriculum), nothing of the sort has happened here. As evidenced by the material submitted to the district court, the district's curriculum has not been altered in any way at the Vesta school, and the same curriculum is taught at Vesta as the Wabasso school. While technology was not initially provided at the Vesta school, and students not exempted from it would have been bussed to Wabasso to receive it, the record shows that technology is now available at the Vesta school. Thus, contrary to the district

court's finding, technology has never been unavailable to students at the Vesta school. In sum, the curriculum—whether the substantive curriculum or the availability of technology—has not been modified or changed in any way at the Vesta school from what is taught at the Wabasso school.

The district granted the parental requests for exemption from technology pursuant to Minn. Stat. Ann. § 126.699 and district policy. Granting the parental requests made pursuant to the statute and the policy served the secular purpose of facilitating the secular education of children at the Vesta school. Even if the district's decision to honor the requests for exemption was motivated by a desire to accommodate the Brethren parents' religious beliefs, such accommodation constitutes a legitimate secular purpose so long as "the relevant governmental decisionmaker . . . [does not] abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters." *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-35 (1987); *see also Lynch*, 465 U.S. at 673 ("Nor does the Constitution require complete separation of church and state, it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."). The record shows that the district honors all parental exemption requests, regardless of motivation.

The district's actions in granting the parental requests for exemption did not have the primary effect of advancing religion. "A law is not unconstitutional simply because it *allows* churches to advance religion . . . . For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337. Although the religious beliefs of the Brethren parents were accommodated by the granting of their requests for exemptions, the district itself did not advance

religion by honoring those requests. *See id.* at 336-37 (any advancement of religion as a result of exemption for religious groups in Civil Rights Act of 1964 could not be "fairly attributed" to the government).

We conclude that the district's application of state law and district policy to grant parental requests for exemption will not result in any excessive entanglement. Because the record shows that the district grants all parental exemption requests and routinely provides alternative instruction, its policy actually "promotes less, rather than more," involvement with religion because the district avoids considering parents' motivations—including religious motivations—for requesting exemptions. *See Clayton*, 884 F.2d at 379; *Good News/Good Sports Club*, 28 F.3d at 1510 (no excessive entanglement where, in applying open-access school use policy, school would not have to distinguish among types of groups wanting to use school). The teachers have altered their teaching methods only to the extent necessary to accommodate the parental exemption requests, as they would any exemption request. *See Agostini*, 1997 WL 338583, at *20 ("Entanglement must be 'excessive' before it runs afoul of the Establishment Clause."); *Wolman*, 433 U.S. at 248 ("It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state."); *cf. Mueller*, 463 U.S. at 403 (no excessive entanglement from requirement that state officials examine textbooks to determine if they qualify for tax deduction so that deductions for sectarian books could be disallowed).

In conclusion, neither the decision to open the Vesta school nor the district's application of the exemption policies violates the *Lemon* test. Both actions had a secular purpose and did not have the primary effect of advancing religion or endorsing the Brethren's religious beliefs. *Cf. Agostini*, 1997 WL 338583, at *21.

B.

Stark and Neely argue that the present case involves a situation that is indistinguishable from that in *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994). In that case, the Supreme Court held unconstitutional a special state statute which created a school district for a village defined exclusively along religious lines. *See id.*, 512 U.S. at 693. The "fundamental source of constitutional concern" in *Kiryas Joel* was that the legislature had not exercised its power in a manner neutral to religion. *See id.* at 703. The Court was concerned that "[b]ecause the religious community of Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law, we have no assurance that the next similarly situated group seeking a school district of its own will receive one." *Id.* (footnote omitted). This lack of neutrality forced the Court to conclude that the creation of the school district violated the Establishment Clause. *See id.* at 704-05. Further, the legislation could not be saved by viewing it as an accommodation of religion because the "proposed accommodation singles out a particular religious sect for special treatment," violating the principle of "neutrality as among religions." *Id.* at 706-07.

This case is not *Kiryas Joel*. As we discussed earlier, the record does not support Stark's and Neely's contention that the district has taken special actions to wrongly benefit the Brethren, and the fact that the district's actions coincide with the desires of certain parents does not mean that the Establishment Clause has been violated. *See Clayton by Clayton*, 884 F.2d at 380.[7] The district here decided, for secular reasons, to open a public school in a

[7] There has been no delegation of political power to the Brethren community in this case. *Cf. Kirvas Joel*, 512 U.S. at 697-702 (plurality opinion) (delegation of political power to group chosen by religious criteria).

building in which a public school had previously been located, a school that is open to all students regardless of religious affiliation. The district grants the requests of all parents for exemptions regardless of religious affiliation.

The extension of a benefit through the neutral application of state law and the district's policy to allow parental requests for exemption from curriculum—even if those requests are motivated by the religious reasons of the parents and the honoring of the requests accommodates those religious beliefs—does not violate the Establishment Clause. The Supreme Court has said:

> A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion. . . . We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and even-handed policies, extends benefits to recipients whose idealogies and viewpoints, including religious ones, are broad and diverse.

Rosenberger v. Rector and Visitors of the Univ. of Virginia, 115 S. Ct. 2510, 2521 (1995); *see also Agostini*, 1997 WL 338583, at *18 ("[W]here the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to religious and secular beneficiaries on a nondiscriminatory basis . . . the aid is less likely to have the effect of advancing religion.").

The state action in this case is well within the boundaries set by cases in which the Supreme Court has upheld "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993). *See, e.g., Rosenberger*, 115 S. Ct. at 2521-25 (neutral program paying for printing of student publi-

cations); *Zobrest*, 509 U.S. at 10-14 (sign-language interpreter for deaf student at Catholic high school); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 486-89 (1986) (vocational assistance for blind person studying for religious vocation at Christian college); *Mueller*, 463 U.S. at 396-99 (tax deduction for educational expenses); *Widmar v. Vincent*, 454 U.S. 263, 273-75 (1981) (open access to university facilities); *Wolman*, 433 U.S. at 237-48 (textbooks, testing, diagnostic and therapeutic services); *Board of Educ. of Central Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 243-44 (1968) (textbooks); *Everson*, 330 U.S. at 17 (bussing reimbursement). Indeed, by granting exemptions without regard to parental motivations, the district has adhered to the principle that "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." *Kiryas Joel*, 512 U.S. at 696 (quotation omitted).

To the extent that the district's application of the state law and district policy to grant the parental requests for exemption can be viewed as accommodating religion by removing a burden from the Brethren families (forcing their children to use technology), such action does not offend the Establishment Clause. "[T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation." *Lynch*, 465 U.S. at 673. The Establishment Clause is not violated when the government accommodates religious beliefs "by relieving people from generally applicable rules that interfere with their religious callings." *Lee v. Weisman*, 505 U.S. 577, 627 (1992) (Souter, J., concurring); *id.* at 628 ("accommodating religion reveals nothing beyond a recognition that general rules can unecessarily offend the religious conscience when they offend the conscience of

secular society not at all"); *Amos*, 483 U.S. at 334 ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." (quoted case omitted)). The district's actions in this case follow our best traditions of the accommodation of religious beliefs in the school context. *See, e.g., Yoder*, 406 U.S. at 234; *Zorach v. Clauson*, 343 U.S. 306, 312-15 (1952); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

C.

Finally, we examine the district's actions under the "endorsement test." *See Kiryas Joel*, 512 U.S. at 720 ("Experience proves that the Establishment Clause . . . cannot easily be reduced to a single test.") (O'Connor, J., concurring in part and concurring in the judgment). The Supreme Court has "paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence." *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989). The endorsement test has been thus explained:

> [T]he Establishment Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." The government violates this prohibition if it endorses or disapproves of religion. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

Id. at 625 (O'Connor, concurring in part and concurring in the judgment) (quoting *Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring)).

As we have discussed, the district has acted neutrally in this case towards the citizens of the district regarding the decision to open the school in Vesta and in applying the exemption policy. Thus, the district has not made anyone's adherence to religion relevant to their standing in the community and consequently has not endorsed religion or a set of religious beliefs.

In sum, the district's actions in this case have not violated the Establishment Clause.

Minnesota Constitution

We must also consider how the district's actions fare under the Minnesota Constitution, for the "limitations contained in the Minnesota Constitution are substantially more restrictive than those imposed by U.S. Const. Amend. I." *Americans United Inc. v. Independent Sch. Dist. No. 622*, 179 N.W.2d 146, 155 (Minn. 1970). The district court did not separately analyze the state constitutional issue, but declared that because the district's actions violated the federal constitution they also violated the state constitution. The issue was briefed on appeal, however, and we exercise our discretion to resolve it because it can be decided as a matter of law. *See Hutchins v. Champion Int'l Corp.*, 110 F.3d 1341, 1345 (8th Cir. 1997) (citing *Talley v. United States Postal Serv.*, 720 F.2d 505, 508 (8th Cir. 1983)).

The Minnesota constitutional provisions preventing the esablishment of religion provide in relevant part that "nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries," Minn. Const. Art. I, § 16, and that "[i]n no case shall any public money or property be appropriated or used for the support of schools wherein the

distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught." Minn. Const. Art. XIII, § 2. The "fundamental concept" is "that the state may neither advance nor inhibit religion, which . . . defines permissible limits of legislation under state law . . . law." *Americans United*, 179 N.W.2d at 157. The "establishment clauses prohibit both 'benefits' and 'support' to schools teaching distinctive religious doctrines." *Minnesota Fed'n of Teachers v. Mammenga*, 500 N.W.2d 136, 138 (Minn. Ct. App. 1993).

As shown above, no religious instruction takes place at the Vesta school, and there is no expenditure of public funds in support of the teaching or promulgating of religous beliefs. Accordingly, we conclude that no violation of the state constitution has occurred.

Conclusion

The injunction is vacated, and the case is remanded to the district court with directions to dismiss the complaint.

MURPHY, Circuit Judge, dissenting.

Because I believe that the establishment by the public school district of this special school in Vesta for children of the Brethren goes beyond what is permitted by the first amendment to the United States Constitution, I respectfully dissent.

The district entered into a contractual arrangement with the religious group known as the Brethren to operate a special public school in Vesta tailored to meet the group's religious concerns. Before 1984 the district operated two elementary schools: one in Wabasso and one fourteen miles away in Vesta. After the school in Vesta was closed for economic reasons, children of the Brethren either attended the regular public elementary school in Wabasso or were homeschooled. Various accommodations were made at Wabasso to respect the religious be-

liefs of the Brethren, such as providing separate tables for their children at lunch and excusing them from activities that involved technological devices. Their opposition to the use of technology includes any use of television, radio, audio and video recordings, computers, or movies.

During 1992-93, the Brethren proposed a joint venture with the school district to reopen the elementary school in Vesta and this proposal was approved at a meeting of the school board in February 1993. The minutes of the meeting and contemporaneous newspaper accounts indicate that the school was identified with the Brethren. One such news story stated in part:

> The Wabasso Board of Education has reached an agreement with the Vesta Brethren to proceed with plans for a K-6 elementary school at Vesta this fall.
>
> . . . .
>
> If it is legally possible to establish this school, it would be operated without the assistance of modern technology such as computers, and video and audio equipment. The reasoning behind this is that the Brethren's religious beliefs prohibit them from using such items, and this has created a conflict in trying to send their children to the public school in Wabasso, which uses such teaching tools and methods.
>
> To eliminate the need to remove these children from the public school environment and teach them at home, the Brethren made the proposal for a second school in Vesta last year.

Vicki L. Gerdes, 'Agreement is Reached on Proposed School in Vesta," *Redwood Gazette*, June 17, 1993.

On October 12, 1993, the Brethren, the school district, and Lloyd Paskewitz entered into a formal written agreement to operate a public elementary school in Vesta.[8]

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[8] The majority finds "little significance" in the fact that the Brethren were party to the lease, but the group's inclusion is sig-

Paskewitz had previously purchased the Vesta school building, and the building was made available under the agreement for the district to use free of charge. Paskewitz and the Brethren also agreed to be responsible for all maintenance, security, taxes, and insurance. In return the district would provide a teacher and educational materials and limit the use of technology. Section 6 of the Agreement provides:

> The School District shall, to the extent permitted under applicable law and rules and regulations adopted by the School Board of the School District, limit the use of technology such as television, radio, audio and/or video recordings, computers and movies in the classrooms at the school provided for herein.

Sections 8 and 9 indicate that the district envisioned a different set of academic offerings at the Vesta school than at the public school in Wabasso. These sections reserve to the district the right to provide special education, health, music, physical education classes, and hot lunches at the Wabasso elementary school for any students at Vesta who might want to participate in these normally available programs which would not be offered at Vesta because of the preferences of the Brethren.

The Brethren were actively involved in other ways in the reopening of the Vesta school. Lloyd Paskewitz and several other members of the Brethren participated in the interviews conducted to select a teacher for the new school. It is undisputed that it was unprecedented to have non-district employees present at such interviews. On June 1, 1993, Lloyd Paskewitz provided Superintendent Bates with a list of 19 children who planned to attend the school in Vesta, and only these children eventually enrolled in the school.

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nificant in light of the district's claim that it did not take into account the religious background or beliefs of those who requested exemptions from the standard curricula.

There are significant differences between the curricula offered at Vesta and Wabasso. Although the official curricula adopted for the Vesta school calls for at least one half hour of computer lab each week and district officials claim computer technology is available at Vesta, computer training has never been offered. Other forms of technology to which the Brethren object, such as television, video players, and films, have not been used at Vesta, although they are regularly used at Wabasso. The health offerings at Vesta are also not the same as those offered at Wabasso. The drug awareness education programs used in the Wabasso school for kindergarten through sixth grade are not available at Vesta. Although the official curricula at Vesta requires one half hour of physical education each day "with specialists," it is presented in an unstructured manner by a parent volunteer who has no formal training in physical education. At Wabasso it is taught in a structured manner by a physical education teacher. The Vesta curricula officially requires at least an hour of musical instruction each week, but the record does not indicate that music is actually offered. If a child at the Vesta school wants such standard curricula offerings, he or she must make a special request and then commute thirty miles in the middle of the school day to Wabasso for health, physical education, or music classes.

The facts of this case show an abandonment of the principle of state neutrality in religious matters which underlies establishment clause jurisprudence. *See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2487 (1994). The first amendment prohibits the state from favoring one religion over another or from favoring religious adherents collectively over nonadherents. *Id.* (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Religious neutrality is particularly important in the context of elementary and secondary schools, where the students are impressionable and attendance is involuntary. *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). While the Supreme Court "has long rec-

ognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause," *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (citations and quotations omitted), "accommodation is not a principle without limits," and at some point accommodation may devolve into an unlawful fostering of religion. *Kiryas Joel*, 114 S. Ct. at 2492; *Amos*, 483 U.S. at 334. An asserted motivation of religious accommodation, even if justified by reference to a state statute, cannot shield governmental actions that otherwise violate the principle of neutrality embedded in the establishment clause. *See Kiryas Joel*, 114 S. Ct. at 2493.[9]

Here the school district has done far more than grant individual exemptions to aspects of the public school curricula under state law, for it has entered into a contractual relationship with members of a religious group to tailor a school to their preferences. The district has agreed to limit the use of technology not for pedagogical reasons, but to match the tenets of a single religious group. It also modified the health, music, physical education, and computer curricula normally offered. The district has acted to create a school where a student interested in participating in the standard health, physical education, music, or computer offerings must make a special request and/or commute almost thirty miles during the school day to obtain such regular educational services at Wabasso. It is not surprising that non-Brethren children have not enrolled at Vesta.

This case is similar to *Kiryas Joel* where the Supreme Court found that the creation of a school district based

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[9] The district's decision to reopen the school by entering into a special written agreement with a religious group could not have been motivated by statutory duties because the district approved the proposal from the Brethren to reopen the school in February 1993 and Minn. Stat. § 126.699 (1996) was not passed until May 1993.

on the religious affiliation of the community members was unconstitutional because it impermissibly singled out a particular religious group for special treatment. 114 S. Ct. at 2491. The village of Kiryas Joel had been established as an enclave for a particular sect of Hasidic Jews called the Satmars who, like the Brethren, eschewed much of the modern world and maintained a very isolated community. The Satmar children were normally educated in private religious schools in the village, but these parochial schools did not provide services for handicapped students as required by state law. The New York legislature created a special school district that conformed to the boundaries of the village so that services for handicapped children could be provided in a way acceptable to the Satmars. Since the community of Kiryas Joel did not receive its benefits "simply as one of many communities eligible for equal treatment under a general law," there was no guarantee that the next religious community desiring its own school district would be given one and the arrangement was unconstitutional. *Id.*

Like the legislature in *Kiryas Joel*, the school district has singled out a particular religious group for benefits by setting up a school the Brethren find acceptable in order to retain their participation in the public school system. There is no guarantee that the next religious group in the district (or elsewhere in the state) could obtain a special school for its members supported with a publicly funded teacher teaching a modified curricula in accordance with their religious beliefs. The establishment of the school in Vesta thus violates the principle of neutrality and "crosses the line from permissible accommodation to impermissible establishment." *Id.*

The district argues it reopened the Vesta school to provide a better public education by transporting fewer students from Vesta to Wabasso, reducing the class size in Wabasso, and by lessening a space shortage there as well, but these purposes could have been carried out by

reopening the Vesta school as it had operated before without a special agreement with the Brethren. The only reason the Brethren are involved is that the district presumably could not afford to reopen the Vesta school without the financial assistance they provided directly in the agreement and indirectly by enrolling their children in the public school system. Even if the district was motivated by improving the overall quality of education in its area, it established a school in which the curricula conformed to the religious objections of the Brethren in exchange for financial assistance. This is not an acceptable secular purpose. *See Epperson*, 393 U.S. at 106 ("There is an can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."); *Edwards*, 482 U.S. at 593 (striking down Louisiana's Creationism act because the "purpose of the . . . Act was to restructure the science curriculum to conform with a particular religious viewpoint"); *Pratt v. Independent Sch. Dist. No. 831*, 670 F.2d 771 (8th Cir. 1982) (removing a film from a school curriculum based on religious objections violated the Establishment Clause).

An impermissible effect of governmental action is one that endorses or promotes religion. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592-601 (1989); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989). Whether the primary effect is impermissible endorsement of religion can be measured by what reasonable observers, including non-adherents, would conclude. *Allegheny*, 492 U.S. at 595, 627-32 (plurality opinion). As the district court pointed out, the way in which the school was reopened and operated created a perception in the community that the school was really just for the children of the Brethren even though it was theoretically open to all students. The effect of establishing the school was thus an endorsement of the Brethren's beliefs.

The majority relies on *Clayton by Clayton v. Place*, 884 F.2d 376 (8th Cir. 1989), for the idea that state action which coincidentally mirrors certain religious beliefs does not have the effect of promoting religion. *Clayton* upheld a rule prohibiting dances at public schools where there is no evidence in the record to indicate why the rule had been passed. *Id.* at 378, 380. In contrast, the actions of the district regarding the school in Vesta did not simply coincide with the beliefs of the Brethren. The record reflects direct involvement of the Brethren in organizing and financing the school. Mr. Paskewitz's letter, the meetings of the school board, and the formal written agreement between the district and the Brethren, all indicate that but for the religious concerns and financial support of the Brethren, the school in Vesta would never have been reopened or operated in the current manner. Here there is far more than mere coincidence between the modifications of the Vesta school program and the beliefs of the Brethren.

The district contends the Vesta school does not advance religion because it is open to all students and the same curricula available at Wabasso is available to Vesta students willing to bus to Wabasso for specific classes, but it is appropriate to look beyond the theory to examine the practical reality of the situation. *See Kiryas Joel*, 114 S. Ct. at 2488-89 (looking at effect of statute, not its form); *Lee v. Weisman*, 505 U.S. 577, 593, 595 (1992) ("subtle and indirect" pressure to participate in religious ceremony can be as real as overt compulsion; "law reaches past formalism"); *Edwards*, 482 U.S. at 586-87 ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."). The contemporaneous newspaper accounts indicate the Vesta school is considered by both Brethren and non-Brethren citizens to be a school for the Brethren children. The Vesta school creates the perception that the state has

singled out the Brethren for special, preferential treatment by modifying the standard curricula to fit their religious objections. Such treatment has the primary effect of creating a state endorsement of the religious views of the Brethren, *Edwards*, 482 U.S. at 593 ("preference" for particular religious beliefs constitutes an endorsement of religion), and cannot be reconciled with the establishment clause cases which require the government to adopt a neutral position toward religion. *See, e.g., Kiryas Joel*, 114 S. Ct. at 2487; *Wallace v. Jaffee*, 472 U.S. 38, 52-54; *Epperson*, 393 U.S. at 104.

Three primary criteria are helpful in considering whether state action has the effect of advancing religion: whether it results in government indoctrination of religious beliefs, whether it defines the aid recipients by reference to religion, and whether it creates an excessive entanglement between the state and religion. *Agostini v. Felton*, Nos. 96-552, 96-553, 1997 WL 338583 (U.S. June 23, 1997) at *21. Applying these factors to the facts of this case, the actions of the district have the impermissible effect of advancing religion.

Aid that furthers the educational function of religious schools is no longer presumed to be invalid per se, *Agostini*, 1997 WL 338583, at *15, but state action may impermissibly indoctrinate religious beliefs when it provides direct aid to religious institutions or when it relieves sectarian institutions of costs they otherwise would bear. *Id.* at *17; *see also Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993). Although the Vesta school is theoretically open to the public, the district's actions are suspect because they relieve the Brethren of costs they would have otherwise borne in homeschooling or establishing their own school. If this arrangement were upheld, it would no longer be necessary for Catholic, Lutheran, Jewish, or Muslim communities to expend the resources required to establish separate parochial schools. They could

also offer a district free rent in a building they own in exchange for a teacher and teaching materials and obtain a religiously homogeneous school with basic educational instruction to their liking. This is the type of direct subsidization that has the effect of advancing religion. *Agostini*, 1997 WL 338583, at *17; *Meek v. Pittenger*, 421 U.S. 349, 365-66 (1975) (lending instructional materials and equipment to sectarian schools has the effect of advancing religion).

Aid provided to all eligible children on the basis of neutral, secular criteria regardless of where they attend school is permissible because it does not define recipients on the basis of religion and does not provide incentives for recipients to modify their religious beliefs. *Agostini*, 1997 WL 338583, at *18-19; *see also Widmar v. Vincent*, 454 U.S. 263, 274 (1981). In contrast, the effect of the Vesta operation is to provide a benefit for the Brethren which it does not provide for non-Brethren. The Brethren children can now obtain a publicly financed education in Vesta that conforms with their particular religious beliefs, while non-Brethren children, either with or without the reopened Vesta school, must still commute to Wabasso if they want to receive all of the curricula regularly offered by the district. The actions of the district violate the establishment clause because they have the effect of singling out the Brethren for a special benefit.

State aid or action will also advance religion if it leads to excessive entanglement between church and state.[10] The test for an impermissible entanglement examines the character and purposes of the institutions benefitted, the nature of the aid provided, and the resulting relationship between the government and the religious authority. *Agostini*, 1997 WL 338583, at *19 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971)). Here, the district has en-

[10] *Agostini* states that previous cases have essentially collapsed the "effect" and "entanglement" prongs of the *Lemon* test. *Id.* at *19.

tered into a contractual relationship with a religious group for mutual benefit, essentially forming a partnership between the Brethren and the district to open and operate the Vesta school with a curricula acceptable to the religious group.

There are many competing values in our richly diverse society, and the religion clauses of the first amendment protect the rights of all to practice the religion of their choice and also prevent the government from preferential advancement of any one religious group. Because the school district's establishment of the special school at Vesta crosses over the line permitted under the Constitution, I dissent.

A true copy

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
D. MINNESOTA
THIRD DIVISION

No. 3-94-1597

MATTHEW STARK and MARCIA NEELY,
Plaintiffs,
v.
INDEPENDENT SCHOOL DISTRICT No. 640,
Defendants.

Aug. 22, 1996

Timothy E. Branson and Joel Wiginton of Dorsey & Whitney, Minneapolis, MN, and Robert J. Bruno, Burnsville, MN, for Plaintiffs.[1]

Pat A. Cipollone and C. Hunter Wiggins of Kirkland & Ellis, Washington, DC, and Erick G. Kaardal of Trimble & Associates, Ltd., Minneapolis, MN, for Defendants.

Roger A. Peterson of Peterson, Engberg & Peterson, Minneapolis, MN, for Amicus Minnesota Federation of Teachers.

MEMORANDUM AND ORDER

DAVIS, District Judge.

In September 1993, the Independent School District No. 640 ("School District") opened an elementary school in Vesta, Minnesota. Matthew Stark and Marcia Neely ('Plaintiffs") are Minnesota state taxpayers who have brought this action seeking to close the Vesta school on

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[1] Plaintiffs have agreed to dismiss the Brethren, as a party defendant, without prejudice and without costs or attorney's fees.

the basis that the creation and operation of the Vesta school violates the First Amendment's guarantee against the establishment of religion.

By its motion, Plaintiffs seek a declaration that the creation and operation of the Vesta school violates the Establishment Clause of the First Amendment and Art. 1 § 16 of the Minnesota Constittuion, a permanent injunction prohibiting the School District from operating the Vesta school or any other school in conformance with the Brethren's religious objections to the use of computers or other technology and media, a judgment against the School District requiring it to refund the state of Minnesota for all state aid received for the students who attended the Vesta school from 1993 to the present, and a judgment pursuant to 42 U.S.C. § 1988 in favor of Plaintiffs against the School District for Plaintiffs' reasonable attorneys' fees and costs of suit.

The School District moves the Court for an Order granting it summary judgment on the basis that the Vesta school is a public school that is simply accommodating the religious beliefs of the parents of the students that attend the Vesta school.

Background

In August 1992, Lloyd Paskewitz ("Paskewitz"), a member of a religious group known as the Brethren, sent a letter to the Superintendent of the School District, George Bates ("Bates").[2] In the letter, Paskewitz told

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[2] The full text of the letter reads as follows:

> As you know, we are very concerned about the education of our children.
>
> As believers in the Lord Jesus Christ, and seeking to be governed by Holy Scripture, we find the developing of evil very disturbing. Not that it isn't fortold in Scripture. We feel that 2 Timothy 2 verses 19-21 is our charter for these last days. In the main, the teachers have been very cooperative, and we appreciate the provision that has been made for us. We are sympathetic with you in your responsibility, and realize that

Bates of their [3] concern for the education of children, and of their fear of the rapid development of scientific devices.

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you have to teach more than you want to, or really have time for. We feel so much is placed upon the school administration that should be taught at home. The 3 R's are a bit neglected. (Working mothers do have an adverse affect on children).

The rapid development of scientific devices is to us a bit frightening in the light of Scripture. We feel that not going in for T.V., Radios, Computers, and Videos will definitely limit our young going into certain fields of work; but we feel that a strong moral fiber built into our young will prove to be sufficient to provide a way through so they have a suitable job and are able to fulfill righteousness. We as parents, I might just say in passing, have proved the goodness of God in this very connection.

Now we would like to make a suggestion for grades K through 6. We would provide a room at the Vesta School, free of charge, if the District would provide a teacher and books.

We would have no objection to it being a public school; but, could we as parents teach the children what they should be taught at home, so the teacher would be free to concentrate on the 3 R's. Our children are very tender, and have been very upset by looking at some movies in the past. They have not been hardened by all the violence and corruption that most children have quite a steady diet of.

Therefore, could it be in the charter of the school in Vesta:

That no T.V., Radios, and Computers be used.
That a sensible dress code be written up.
That no smoking, drinking or swearing be allowed.

There would be approximately 21 children that I know of that would be interested in K-6. We have also heard there might be others besides the Brethren that would want their children enrolled in Vesta.

We would require no school transportation, no lunches, and we could supply a helper for school recess.

The cost to the District would be primarily just the teacher's salary and books.

Yours truly,

Mr. Lloyd Paskewitz

[3] In the letter, Paskewitz uses the term "we", the inference being he refers to the concerns of the "Brethren."

To address these concerns, Paskewitz suggested to Bates that a school be opened in Vesta, Minnesota. Paskewitz stated they would provide the space free of charge, if the School District provided the teacher and books.[4] As to the curriculum to be taught. Paskewitz provided the following:

> We would have no objection to it being a public school; but, could we as parents teach the children what they should be taught at home, so the teacher would be free to concentratee on the 3 R's. Our children are very tender, and have been very upset by looking at some movies in the past. They have not been hardened by all the violence and corruption that most childen have quite a steady diet of.

Therefore, could it be in the charter of the school in Vesta:

> That no T.V., Radios, Videos, and Computers be used.
>
> * * * *

(Wiginton Aff.Ex. D).

The parties do not dispute that the Brethren consist of a group of people who possess similar beliefs, one such belief being the general objection to the use of technological devices, such as computers, television, films and other modern technology and media. The Brethren also practice separatist and anti-mixing beliefs by not eating meals with persons who do not share their beliefs. Historically, Brethren children attending public school required a separate table at lunchtime to allow the children to practice their separatist beliefs. (Paskewitz Dep. pp. 20-22).

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[4] The School District previously ran a public school in Vesta, Minnesota, but it was closed down in 1984 for economic reasons. Paskewitz owns the building that formerly housed the public school in Vesta, Minnesota.

In February 1993, the School District addressed the Paskewitz request at its regular Board Meeting. (Wiginton Aff.Ex. F). Therefore, the decision was made by the School District to open the school in Vesta for the 1993-1994 school year. On June 1, 1993, Paskewitz wrote Bates stating: "Following is a list of pupils that are planning to attend the Vesta Public School. Two of our children have moved, bringing the total to 19." (Wigginton Aff.Ex. H). In fact, the 19 children that attended the Vesta school during the 1993-94 school year were the same 19 children named in Paskewitz' letter.

In connection with the opening of the Vesta school, the School District, Paskewitz and the "Brethren" [5] entered into an Agreement on October 12, 1993, pursuant to which Paskewitz would lease the building to the School District free of charge and all maintenance, security, taxes and insurance would be paid by Paskewitz. (Wiginton Aff.Ex. R). In exchange, the School District agreed to provide a teacher and the necessary classroom materials and establish the curriculum. Section 6 of the Agreement provides "The School District shall, to the extent permitted under applicable law and rules and regulations adopted by the School Board of the School District, limit the use of technology such as television, radio, audio and/or video recordings, computers and movies in the classrooms at the school provided for herein." Sections 8 and 9 also reserve to the School District the right to provide special education or other services to students attending the Vesta School, at the Wabasso Elementary School.[6]

It is undisputed that computers and other technology or media have never been used at the Vesta school since its opening in 1993, while such tools are routinely used at the Wabasso school. And although no confirmation has

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[5] Brethren was apparently misspelled throughout the Agreement.

[6] From 1984, when the original Vesta Elementary School closed, up through the 1992-93 school year, all children residing in Vesta attended the Wabasso elementary school.

been made as to the religious affiliations of the students attending the Vesta school, there is evidence supporting the Plaintiffs' assertion that all of the children that have attended the Vesta school since its opening have been Brethren children, *See*, Eichten Dep. p. 35; Rohlik Dep. p. 11; Neely Dep. p. 18; Carlson Dep. pp. 61-62, and there is no evidence that non-Brethren children have attended the Vesta school since 1993. No religion classes are taught at the Vesta school.

The curriculum at the Vesta school also differs from the Wabasso school's curriculum to the extent that classes such as health, physical education and music are not offered at the Vesta school. Such classes are, however, available for the Vesta students at the Wabasso school. Furthermore, no lunches are provided at the Vesta school because the Brethren children go to their homes for lunch. The School District emphasizes, however, that if a non-Brethren child were to attend the Vesta school, that a lunch would be provided to that child at the school if so desired.

It is Plaintiffs' assertion that the above facts warrant a finding that the opening and operation of the Vesta school presents a clear violation of the Establishment Clause of the First Amendment.[7] The School District re-

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[7] In a footnote, the School District challenged Plaintiffs' taxpayer standing. The School District argues that to maintain taxpayer standing, Plaintiffs must show there has been a disbursement of tax money in potential violation of constitutional guarantees. The School District then asserts that as Plaintiffs have failed to show an "additional" disbursement of tax money in the creation of the Vesta school, they lack taxpayer standing, relying on *Minnesota Fed'n of Teachers v. Randall*, 891 F.2d 1354, 1358 (8th Cir.1989). The School District has misconstrued the holding in *Minnesota Fed'n of Teachers* for the Eighth Circuit specifically held it was not necessary to require a taxpayer to establish an increase in their tax burdens, for to do so may lead to an abolition of taxpayer standing altogether. 891 F.2d at 1358. Accordingly, the Court finds Plaintiffs have standing.

sponds that the opening and operation of the Vesta school was entirely within its discretion, and that the facts warrant a finding that the School District was merely accommodating the religious beliefs of parents as it is required to do by law. For the reasons stated herein, the Court finds the decision to open, and the manner of operation of, the Vesta school violates the Establishment Clause.

Standard for Summary Judgment

Summary judgment is appropriate if there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.*, 980 F.2d 1217, 1219-20 (8th Cir.1992). To determine whether genuine issues of material fact exist, a court conducts a two-part inquiry. The court determines materiality from the substantive law governing the claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Disputes over facts that might affect the outcome of the lawsuit according to applicable substantive law are material. *Id.* A material fact dispute is "genuine" if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party. *Id.* at 248-49, 106 S.Ct. at 2510-11.

Before the Court are cross-motions for summary judgment. Neither party is asserting genuine issues of fact exist to preclude summary judgment. Rather, the parties argue the facts as they exist warrant judgment in their favor as a matter of law.

Establishment Clause

The Establishment Clause of the First Amendment, applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion." *McCollum v. Board of Educa-*

tion, 333 U.S. 203, 210-11, 68 S.Ct. 461, 464-65, 92 L.Ed. 649 (1948).[8] Primarily, the Establishment Clause proscribes the "sponsorship, financial support, and active involvement of the sovereign in religious activity." *School District of the City of Grand Rapids v. Ball,* 473 U.S. 373, 381, 105 S.Ct. 3216, 3221, 87 L.Ed.2d 267 (1985) (internal citations omitted).

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any relgious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'

Everson v. Board of Education of Ewing TP et al., 330 U.S. 1, 15-16, 67 S.Ct. 504, 511-12, 91 L.Ed 711 (1947).

Not only does the Establishment Clause proscribe the creation of a state religion, it also requires that the government remain neutral to religion. *Parents' Assoc. of P.S. 16 v. Quinones,* 803 F.2d 1235, 1240 (2nd Cir.

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[8] The Minnesota Constitution also contains an establishment clause. ". . . [N]or shall . . . any preference be given by law to any religious establishment or mode of worship . . ." Art. 1, § 16.

1986) (*citing, School Dist. of Abington Tp. v. Schempp,* 374 U.S. 203, 215-16, 83 S.Ct. 1560, 1567-68, 10 L.Ed. 2d 844 (1963)). "The rationale behind the requirement of neutrality is, in part, that governmental actions giving even the appearance of favoring one religion over another are likely to cause diviseness and disrespect for government by those who hold contrary beliefs." *Id.*

In this case, the Court has been asked to determine whether the opening and operation of the Vesta school violates the Establishment Clause. In making this determination, a court must recognize that the states and local school boards are afforded comprehensive powers and substantial discretion in the operation of public schools. *Edwards v. Aguillard,* 482 U.S. 578, 583, 107 S.Ct. 2573, 2577, 96 L.Ed.2d 510 (1987). *See also Pratt v. Independent School District No. 831,* 670 F.2d 771, 775 (8th Cir.1982). A court must also recognize that it is within the school board's discretion to determine the most appropriate curriculum that is most suitable for the students, as well as the teaching methods and educational tools to be used. *Pratt,* 670 F.2d at 775. However, in exercising its broad discretion, the School District is nonetheless bound by the proscriptions of the Establishment Clause. When circumstances arise that directly and sharply implicate constitutional values, a court must intervene. *Epperson v. Arkansas,* 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968).

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or family. Students in such institutions are impressionable and their attendance is involuntary.

Edwards, 482 U.S. at 583-584, 107 S.Ct. at 2577. Thus, in its analysis, this Court must be ever mindful of the particular concerns that arise in the context of the public elementary schools.

To assist the Court in determining whether state action violates the Establishment Clause, the United States Supreme Court developed a three part test in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The *Lemon* test provides that to withstand scrutiny, the state action must have a secular purpose, its principle or primary effect must be one that neither advances nor inhibits religion and the state action must not foster an excessive entanglement with religion. *Id.* 403 U.S. at 612-13, 91 S.Ct. at 2111-12. In *Grand Rapids,* the Court noted that it particularly relied on *Lemon* in cases involving religion and schools. 473 U.S. at 383, 105 S.Ct. at 3222.

Today, the status of the *Lemon* test as a general purpose tool for administering the Establishment Clause is in doubt. *Sherman v. Community Consolidated School District 21 of Wheeling Township,* 980 F.2d 437 (7th Cir.1992) (citing U.S. Supreme Court cases in which *Lemon* called into doubt). *See also, Board of Education of Kiryas Joel Village School Dist. v. Grumet,* 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) (O'Connor, J., concurrence calling into doubt use of a single test on a constitutional principle that operates differently in different contexts) (Scalia, J. joined by Rehnquist, C.J., and Thomas, J. dissenting, *Lemon* test should be replaced). Although *Lemon* has not been expressly overruled, the United States Supreme Court has nonetheless decided many Establishment Clause cases without applying the *Lemon* test. *See e.g., Larson v. Valente,* 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) (applying strict scrutiny); *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (finding government involvement with religious activity so pervasive to

the point of creating a state-sponsored and state-directed religious activity, that it was unnecessary to apply, or reconsider *Lemon*); *Kiryas Joel,* 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) (statute clearly violated establishment clause because it delegated power to an electorate defined by common religious belief and practice in a manner failing to foreclose religious favoritism). Given the fact that *Lemon* is not uniformly applied, it appears that application of the test is no longer a prerequisite. It is nonetheless available as a guideline "with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Grand Rapids,* 473 U.S. at 383, 105 S.Ct. at 3222. As will be discussed in further detail below, the Court finds that the facts presented by this case provide a clear example of state sponsorship, or the advancement, of a religion which violates the mandates of the First Amendment and will rely on *Lemon* as a guideline only.

Analysis

The main thrust of the School District's argument in support of its decision to open and operate the Vesta school, is that it was accommodating the religious beliefs of the Brethren, as it is required to do by law. While it is true that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause," *Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-day Saints v. Amos,* 483 U.S. 327, 334, 107 S.Ct. 2862, 2867, 97 L.Ed.2d 273 (1987) (*quoting, Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 144-145, 107 S.Ct. 1046, 1050-51, 94 L.Ed.2d 190 (1987)), it is also true that accommodation is not a principle without limits. *Amos,* 483 U.S. at 334-335, 107 S.Ct. at 2868. At some point, an accommodation may devolve into an unlawful fostering of religion. *Id.*

> The principle that government may accommodate the free exercise of religion does not supersede the funda-

> mental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith or tends to do so.'

Lee v. Weisman, 505 U.S. at 587, 112 S.Ct. at 2655. State action that in and of itself violates the Establishment Clause cannot be saved by labeling it an accommodation.

For example, in *Kiryas Joel*, the Court found that a statute enacted by a special and unusual Act failed the test of neutrality because it aided a particular religion. The Act at issue created a special school district whose boundaries were drawn to include only property owned and inhabited by a particular religious sect, which in turn empowered a locally elected board of education to take action such as opening and closing schools, hiring teachers and prescribing textbooks. The Court found the statute "departs from constitutional command by delegating the State's discretionary authority over public school to a group defined by its character as a religious community, in a legal and historical context that gives not assurance that the governmental power has been or will be exercised neutrally." *Id.* at ——, 114 S.Ct. at 2487.

In its analysis, the Court also recognized the Constitution allows the state to accommodate religious needs. *Id.* at ——, 114 S.Ct. at 2492. The Court referred to two of its prior decisions that upheld accommodations which allowed religious communities and institutions to pursue their beliefs free from governmental interference. *Id.* at ——, 114 S.Ct. at 2493 (*citing Corporation of Presiding Bishop v. Amos, supra,* (government may allow religious organizations to favor their own adherents in hiring, even for secular employment) and *Zorach v. Clauson*, 343 U.S.

306, 72 S.Ct. 679, 96 L.Ed. 954 (1952) (government may allow public schools to release students during the school day to receive off-site religious education)). The Court went on to state, however, that an otherwise unconstitutional delegation of political power to a religious group could never be saved as a religious accommodation. *Id.*

In another accommodation case, the Second Circuit Court of Appeals in *Parents' Assoc. of P.S. 16 v. Quinones,* was asked to issue a preliminary injunction enjoining a school district's plan to provide remedial education classes for students of a parochial school on public school premises. The parochial school at issue in this case, Beth Rachel, is a school which teaches girls of the Hasidic Jewish Faith. The Hasidic faith stresses a strict separation between the Hasidim and the rest of society, and stresses strict separation of males and females within the sect for virtually every activity, including schooling. Yiddish is the only language spoken in the home. To accommodate these strict religious beliefs, the school district proposed to provide remedial education to Beth Rachel students in nine classrooms in a wing of P.S. 16. The section would be closed off from the rest of the school through the construction of swinging doors and English would be taught as a second language.

The court found that the school district's plan plainly created a symbolic link between the state and the Hasidic sect that would likely have magnified negative impact on the minds of the young children attending P.S. 16. *Quinones,* 803 F.2d at 1241.

In this case, the School District asserts it accommodated the religious beliefs of the Brethren by opening the Vesta school, where to date, no technology is utilized. Furthermore, children are allowed to go home for lunch to accommodate the separatist beliefs of the Brethren. Finally, music, health and physical education are not

offered at the Vesta school, but is available to a Vesta student at the Wabasso school.

Plaintiffs assert, and this Court agrees, that a school district cannot open a school nor modify its curriculum based solely on the request of a religious group. In *Epperson v. Arkansas*, the Court found unconstitutional a state statute that made it unlawful to teach, in public schools and universities, the theory that man evolved from other species of life, or to adopt or use in a public school or university, a textbook that taught the theory of evolution. Applying the Establishment Clause's proscriptions in the school setting, the Court determined

> the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion . . . This prohibition is absolute. It forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma.

Epperson, 393 U.S. at 106-107, 89 S.Ct. at 271-72. The Court then applied what are essentially the first and second prongs of the *Lemon* test to reach its holding that the statute was unconstitutional—What was the purpose and primary effect of the statute? "If either is the advancement or inhibition of religion then the [statute] exceeds the scope of legislative power as circumscribed by the Constitution." *Id.* at 107, 89 S.Ct. at 272 (citation omitted). The Court found that the sole reason the statute was enacted was because of "fundamentalist sectarian convictions." *Epperson*, 393 U.S. at 107-108, 89 S.Ct. at 272-73. Accordingly, the statute's purpose and primary effect was that of advancing religion. *Id. Accord, Edwards v. Aguillard, supra* (striking down a state statute that required creation science be taught where evolution was taught because the purpose of the statute was to restructure the science curriculum to conform to religious beliefs).

In *Pratt v. Ind. School Dist. No. 831, supra* the Eighth Circuit Court of Appeals held a school board's decision to remove the film "The Lottery" from the curriculum was unconstitutional because the decision was not made to serve substantial or reasonable governmental interests. Rather, the court found the basis for the decision was because a majority of the school board found the film's ideological and religious themes offensive. *Id.* at 778. In reaching its decision, the court rejected the school board's purported rationale for its action and affirmed the district court's finding that "the self-serving statements of the school board, made after the fact and not based on the previous record, to the effect that this film is excluded because of the violence it teaches, are untenable in the light of the circumstances under which they were made." *Id.*

The School District attempts to distinguish *Epperson, Edwards* and *Pratt* from this case on the basis that they are not accommodation cases. As discussed above, the School District cannot escape the consequences of unconstitutional actions by labeling it an accommodation. The principles of *Epperson, Edwards* and *Pratt* are clearly applicable to this case, because such cases inform that the School District cannot tailor its curriculum for the sole purpose of conforming to religious beliefs.

After a careful review of the submissions of the parties and all relevant case law, the Court finds that the opening, and the manner of operation of, the Vesta school lacks a secular purpose and was done to conform to the religious beliefs of the Brethren.[9] The record before the Court

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[9] In its briefs, the School District asserts that this Court has already ruled that the Vesta school is secular on its face and does not advance or inhibit religion, citing the Report and Recommendation of Magistrate Judge John Mason, adopted by this Court. In the Report and Recommendation, Magistrate Judge Mason recommended Lloyd Paskewitz be dismissed without prejudice, as complete relief could be granted in his absence. The motion at issue

establishes that negotiations and discussions concerning the possible opening of a school in Vesta commenced only after the superintendent, Bates, received the letter written by Paskewitz offering a building site, free of charge, with suggestions as to the curriculum to be offered. There is no evidence that the School District had contemplated reopening the Vesta school prior to the receipt of Paskewitz' letter. When the school was opened in Vesta, at the building owned by Paskewitz, the curriculum provided to its students was modified to exclude the use of computers and any other type of technology or media. No school lunches were provided as all children were allowed to go home for lunch. What these undisputed facts suggest is that the School District made a decision to open and operate a school in the manner suggested by Paskewitz in his letter to Bates. In other words, in a manner that specifically conforms to the religious beliefs of the Brethren.

The primary effect of the School District's decision to open the Vesta school is that of promoting religion. Evidence has been presented to the Court which shows that the perception of the community is that the Vesta school is a "Brethren" school. Although the school's charter provides that the school is a public school, and that anyone residing in the school district can attend, only Brethren children have attended the school. This fact is significant

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in the Report and Recommendation addressed lawsuit structure. *See*, October 4, 1995 Report and Recommendation p. 5. The claims against Lloyd Paskewitz concerned the lease agreement entered into between Paskewitz, the Brethren and the School District. The Plaintiffs' claimed in their Complaint that the Agreement, in and of itself, violated the Establishment Clause. Magistrate Judge Mason noted a distinction needed to be drawn between the Agreement and the operation of the Vesta school. *Id.* at 6, and determined that the *Agreement* was secular on its face—not the operation of the Vesta school. Accordingly, the School District's assertion that this Court has previously determined the decision to open and operate the Vesta school is completely without merit.

because the complete segregation of the Vesta school population is not the result of a random feature or a geographic function. There are non-brethren children that live in Vesta whose parents have made the decision to send them to Wabasso, which is 14 miles away.

Furthermore, Plaintiffs' have submitted a number of area newspaper articles, which chronicled the events leading up to the opening of the Vesta school. In these articles, many references are made to the agreements made between the Vesta Brethren and the School District to open an elementary school in Vesta.

> Bates mentioned the plans of the Vesta religious organization known as The Brethren to open an elementary school in Vesta next year.
>
> Following a meeting between school administration and Brethren representatives on Feb. 3, it looked very probable that the school will open next fall.

The Redwood Gazette, dated Monday, February 15, 1983, Wiginton Aff. Ex.G.

> The Wabasso Board of Education has reached agreement with the Vesta Brethren to proceed with plans for a K-6 elementary school at Vesta this fall.
>
> The board approved a motion to "begin pursuing legal avenues" to try and get the school open this fall.
>
> The Brethren, who sent about a dozen representatives to Monday's board meeting, were also asked to look into how much it would cost to get the former Vesta school building—which they own—remodeled according to current state building, health and safety codes.
>
> If it is legally posesible to establish this school, it would be operated without the assistance of modern technology such as computers, and video and audio equipment. The reasoning behind this is that the

> Brethren's religious beliefs prohibit them from using such items and this has created a conflict in trying to send their children to the public school in Wabasso, which uses such teaching tools and methods.
>
> * * * *

The Redwood Gazette, dated June 17, 1993, Wiginton Aff.Ex.I.

Another example of the perceptions of the community that the Vesta school is a "Brethren" school is an application the School District received when it was in the process of hiring a teacher for the Vesta school. In the cover letter, the applicant thought it important to note that she had experience at "church affiliated schools." Wiginton Aff.Ex.J.

What the School District has done is create an impermissible identification of its powers and duties with the religious beliefs of the Brethren by agreeing to open the Vesta school in a building owned by a Brethren brother, and in the manner expressed by the Brethren. The fact that no religion is taught at the school does not affect the constitutional violation in this case.

> Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.

Grand Rapids, 473 U.S. at 389, 105 S.Ct. at 3225. "The mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Id.* (*quoting, Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-126. 103 S.Ct. 505, 511-12, 74 L.Ed.2d 297 (1982)).

Because this case involves a public elementary school, the perceptions of the young children of this community are of the utmost importance. "[P]roviding a crucial symbolic link between government and religion, thereby enlising—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination." *Quinones,* at 235 (*citing Grand Rapids,* 473 U.S. at 383, 105 S.Ct. at 3222).

Nor does it matter that the state action involved in this case only benefits and endorses the beliefs of one religious sect. *Kiryas Joel,* 512 U.S. at ——, 114 S.Ct. at 2481. ("Here the benefit flows only to one single sect, but aiding this single, small religious group causes no less a constitutional problem that would follow from aiding a sect with more members or religion as a whole.") It is this Court's determination that the undisputed facts as presented by the parties clearly establish that the opening and operation of the Vesta school "conveys a message of government endorsement . . . of religion" that violates a core purpose of the Establishment Clause.

The School District argues that its decision to open the Vesta school, and the decision not to utilize technology there was made without inquiring into parental motivation. In its brief, the School District asserts that the presentation to the school board regarding the possible opening of the Vesta school did not contain references to the religious backgrounds or beliefs of the students who would attend the Vesta school. (Mem. in Opp. to Plaintiffs' Motion for S.J. and in Support of Def.'s Cross Motion for S.J., p. 18.) Sufficient evidence has been presented, however, to establish that the members of the school board were completely cognizant of the relationship between the proposition to open a school in Vesta and the religious affiliations of those parents proposing the school and the religious tenets of the Brethren which do not encompass the use of technology or other media. (*See*, Wiginton, Aff.

Exs. G. I, M, and N, Articles from *The Redwood Gazette;* Wiginton. Aff.Ex.F, School Board's minutes "Meeting with the Brethren, Vesta Building.")

The School District also argues the Vesta school's curriculum is consistent with other schools within its boundaries as technology is *offered* at the Vesta school. In reality, however, technology is not offered at the Vesta school. The teachers at the Vesta school testified at their depositions that technology has not been available at Vesta since its opening in 1993. The record before the Court suggests that because the perception exists that the Vesta school is a Brethren school, non-Brethren children will not attend Vesta and technology will continue to be conspicuously absent.

Finally, the School District argues that what Plaintiffs are asking the Court to do is unlawfully discriminate against religion under the guise of an improper interpretation of the Establishment Clause. A similar argument was addressed in *Quinones, supra.*

> The Free Exercise Clause of the First Amendment ("Congress shall make no law . . . prohibiting the free exercise [of religion]") does not prohibit a government from forcing a choice between receipt of a public benefit and pursuit of a religious belief if it can show a compelling reason for doing so . . . Avoiding a violation of the Establishment Clause that would otherwise result from an apparent endorsement of the tenets of a particular faith is ample reason for compelling that choice.

803 F.2d at 1241-1242. The court in *Quinones* went on to note that "it was difficult to believe" that alternatives were not available that would not invoke the Establishment Clause. *Id.* at 1242.

Similarly, in this case, this Court finds it difficult to believe that alternatives are not available to the School District, which would accommodate the religious beliefs of

the Brethren without resulting in such a clear endorsement of the Brethren's belief, as is the result here. Were not accommodations made for the Brethren children prior to the opening of the Vesta school?

Based on the above, the Court finds that the creation and operation of the Vesta school violates the mandates of the First Amendment's Establishment Clause as well as the Article 1, Section 16 of the Minnesota Constitution, by advancing religion.

In addition to requesting a declaration that the creation and operation of the Vesta school violates the Establishment Clause, and a permanent injunction enjoining further operation of the Vesta school or any school in conformance with the Brethren's religious beliefs, Plaintiffs also ask that the School District be required to refund the State of Minnesota all state aid received for the students who have attended the Vesta school since its inception and a judgment for attorney's fees and costs. Plaintiffs did not argue their entitlement to such relief in their briefs to the Court, and the Court is reluctant to do so at this time.

Accordingly, IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Summary Judgment is GRANTED in part and DENIED in part.

2. Independent School District No. 640 (the "School District") violated the Establishment Clause of the First Amendment and Art. 1, § 16 of the Minnesota Constitution by agreeing with the religious group known as the Brethren to open and operate a public elementary school for Brethren children in space leased for free from a member of the Brethren with a curriculum modified to delete the use of computers and other technology and media in conformance with religious objections raised by the Brethren.

3. The School District's operation of the Vesta School, attended only by Brethren children, with a curriculum

modified to conform to Brethren religious objections to computers and other technology and media violates the United States and Minnesota Constitutions.

4. The School District is hereby enjoined from operating the Vesta School or any other school in conformance with the Brethren's religious objections to the use of computers and other technology and media.

5. The remaining requests for relief, concerning refunds to the State of Minnesota and a judgment of reasonable attorney's fees and costs are DENIED without prejudice. The parties may each submit a five page brief addressing the issues of refund and attorney's fees by August 29, 1996. No responsive briefs will be accepted by the Court.

6. Plaintiffs' claims against the Brethren are dismissed without prejudice and without costs or attorney's fees.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3250MNST

MATTHEW STARK, *et al.*,
Appellees,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 640, ETC.
Appellant,

JEFF PASKEWITZ, *et al.*,
Amicus Curiae.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

The suggestion for rehearing en banc is denied. Chief Judge Richard S. Arnold, Judge McMillian, and Judge Murphy would grant the suggestion.

The petition for rehearing by the panel is also denied.

November 24, 1997

Order Entered at the Direction of the Court:

/s/ Illegible
Clerk
U.S. Court of Appeals
Eighth Circuit

APPENDIX D

August 1992

Mr. George Bates, Superintendent
Wabasso Public School
District #640
Wabasso, Minnesota

Dear Mr. Bates:

As you know, we are very concerned about the education of our children.

As believers in the Lord Jesus Christ, and seeking to be governed by Holy Scripture, we find the developing of evil very disturbing. Not that it isn't fortold in Scripture. We feel that 2 Timothy 2 verses 19-21 is our charter for these last days.

In the main, the teachers have been very cooperative, and we appreciate the provision that has been made for us. We are sympathetic with you in your responsibility, and realize that you have to teach more than you want to, or really have time for. We feel so much is placed upon the school administration that should be taught at home. The 3 R's are a bit neglected. (Working mothers do have an adverse affect on children).

The rapid development of scientific devices is to us a bit frightening in the light of Scripture.

We feel that not going in for T.V., Radios, Computers, and Videos will definitely limit our young going into certain fields of work; but we feel that a strong moral fiber built into our young will prove to be sufficient to provide a way through so they have a suitable job and are able to fulfill righteousness. We as parents, I might just say in passing, have proved the goodness of God in this very connection.

Now we would like to make a suggestion for grades K thru 6. We would provide a room at the Vesta School,

free of charge, if the District would provide a teacher and books.

We would have no objection to it being a public school; but, could we as parents teach the children what they should be taught at home, so the teacher would be free to concentrate on the 3 R's. Our children are very tender, and have been very upset by looking at some movies in the past. They have not been hardened by all the violence and corruption that most children have quite a steady diet of.

Therefore, could it be in the charter of the school in Vesta:

That no T.V., Radios, Videos, and Computers be used.

That a sensible dress code be written up.

That no smoking, drinking or swearing be allowed. There would be approximately 21 children that I know of that would be interested in K-6. We have also heard there might be others besides the Brethren that would want their children enrolled in Vesta.

We would require no school transportation, no lunches, and we could supply a helper for school recess.

The cost to the District would be primarily just the teacher's salary and books.

Yours Truly,

Mr. Lloyd Paskewitz

c.c. Mr. Richard Pattee

APPENDIX E

AGREEMENT

THIS AGREEMENT is entered into this 12th day of October, 1993, by and between the School Board of Independent School District No. 640, Wabasso, Minnesota (hereinafter referred to as the "School District"), Brethren and Lloyd Paskewitz (hereinafter referred to as ("Paskewitz").

WHEREAS, Brethren educated resident secondary students of the School District during the 1992-93 school year in a home-school pursuant to Minn. Stat. §§ 120.101 and 120.102, and intends to educate resident elementary students of the School District in kindergarten through grade 6 for the 1993-94 school year in a home-school; and

WHEREAS, the School District wishes to open a public school in Vesta, Minnesota for the purpose of educating resident students of the School District in kindergarten through grade 6 in a multi-age/grade classroom commencing with the 1993-94 school year; and

WHEREAS, a member of Brethren, Paskewitz, owns a building located in Vesta, Minnesota which previously housed the old elementary school in Vesta;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties do hereby agree as follows:

I. OPERATION OF SCHOOL

Section 1. *Elementary School.* The School District shall operate a public school for any resident student in the School District in Kindergarten through grade 6 of the old elementary school in Vesta, Minnesota. The students educated at said school shall be educated in a multi-age/grade classroom.

Section 2. *Teaching Staff.* The School District shall provide one licensed elementary teacher to provide all instruction to all students enrolled at the school as provided in this Article Any and all teaching staff provided by the School District pursuant to this Agreement shall not be considered employees of Brethren or Paskewitz for any purpose, including, but not limited to, salaries, wages or other compensation or fringe benefits; worker's compensation; unemployment compensation; teachers' or public employees' retirement; social security; liability insurance; keeping of personnel records; termination or discharge of employment; individual contracts; and continuing contract rights.

Section 3. *Administration.* The School District shall provide administrative services for the school as provided in this Article on such a basis as it, in its sole discretion, deems necessary.

Section 4. *Curriculum.* The School District shall establish the curriculum of study and adopt rules and regulations for all students attending said school in compliance with state laws and rules.

Section 5. *Classroom Materials.* The School District shall provide such classroom materials as it deems necessary for the instruction of the students in said school. Brethren shall have the right to comment on and provide imput regarding the selection and use of such materials to the same extent as other parents in the School District pursuant to applicable law and the rules and regulations adopted by the School Board of the School District. The School District, however, retains the sole discretion in regard to the final approval of any textbooks and/or materials utilized in the instruction of said students.

Section 6. *Use of Technology.* The School District shall, to the extent permitted under applicable law and rules and regulations adopted by the School Board of the School District, limit the use of technology such as tele-

vision, radio, audio and/or video recordings, computers and movies in the classrooms at the school provided for herein.

Section 7. *School Calendar.* The School District shall establish the school calendar pursuant to Minn. Stat. § 126.12.

Section 8. *Special Education.* The School District reserves the right to provide special education services to any elementary student who is educated at the school as provided for herein and is eligible for special education services pursuant to state and/or federal laws and the rules and/or regulations promulgated thereunder at the Wabasso Elementary School.

Section 9. *Other Services.* The School District reserves the right to educate any student who wishes to be educated at the school as provided for herein and who is eligible to receive, or wishes to receive, other services such as Chapter I, counseling, health, physical education, music and/or hot lunch at the Wabasso Elementary School.

Section 10. *Transportation.* The School District shall provide transportation to all eligible students pursuant to Minnesota law and the rules promulgated thereunder.

Section 11. *School District Policies. All policies* adopted by the School Board of the School District including, but not limited to, those policies regarding the operation of a smoke and drug-free environment and discipline and behavior of students, shall apply at the school provided for herein, unless specifically provided otherwise.

II. BUILDING

Section 1. *Building to be Used as School.* Brethren and Paskewitz shall lease to the School District such classrooms and/or education space in the old elementary school in Vesta, Minnesota, as deemed necessary by the School District for purposes of operating a school as provided for in Article I herein.

Section 2. *Consideration for Lease of Premises.* The sole consideration on the part of the School District for the use of the leased premises shall be the provision of educational services as provided for herein, while the consideration to Brethern and Paskewitz for providing such premises shall be the provision of educational services by the School District in Vesta.

Section 3. *Utilities.* Bretheren and/or Paskewitz shall make adequate provision and fully and promptly pay for all gas, heat, power, telephone services or other public utilities of every kind requested by the School District and furnished to the leased premises throughout the term hereof.

Section 4. *Condition of Leased Premises.* Brethern and Paskewitz represent that they are not aware of any substantial defect in the old elementary school in Vesta, Minnesota, and that said school is in compliance with all applicable laws, codes and/or rules for the use of a school building. In the event that any maintenance, repairs, improvements and/or alterations are required to bring said building in compliance with any applicable laws, codes and/or rules, Brethern shall be solely responsible for performing such maintenance repairs, improvements and/or alterations at its own expense.

Section 5. *Maintenance, Repair or Replacement.*

Subd. a. *Custodial Services.* Brethern shall provide at its own expense all reasonable and required custodial services.

Subd. b. *Maintenance and Repair.* Brethern shall maintain and repair at its own expense all facets of said building including, but not limited to, maintenance, repair or replacement of all structural members, walls, footings, roofs, doorways and floors; maintenance of all parking areas, driveways and walkways, maintenance, repair or replacement to the

boiler and heat system, water supply and/or other plumbing, and electrical system. All maintenance, repairs and replacements shall be made promptly and in a good workman-like manner.

Subd. c. *Snow Removal.* Brethern shall be responsible for the removal of snow and ice from the sidewalks and parking areas at its own expense.

Subd. d. *Mowing of Grass.* Brethern shall be responsible for mowing all grass and trimming of shrubs, bushes and/or trees at its own expense located on the property upon which the building is situated.

Section 6. *Representation of Title.* Brethern and Paskewitz represent that they have full right, power and authority to enter into a lease of the premises in question and for the term herein granted and that the premises may be used by the School District for the entire term, unless earlier terminated, for the purposes set forth herein.

Section 7. *Security.* Brethern shall be solely responsible for the security of the school building.

Section 8. *Hours of Use.* Brethern and Paskewitz shall make the school building available during any hours designated by the School District.

Section 9. *Religious Symbols and/or Artifacts.* Brethern and Paskewitz shall ensure that no religious symbols and/or artifacts are displayed in those portions of the building utilized by the School District pursuant to this Agreement and that no religious instruction shall take place at said building.

Section 10. *Taxes.* Brethern and Paskewitz shall be responsible for the payment of any and all real estate taxes levied with respect to the school building and shall make payment of any such taxes promptly when due.

III. INSURANCE

Section 1. *Property Insurance.*

Subd. a. *Building.* Paskewitz shall at all times during the term of this Agreement obtain and maintain in full force and effect a property insurance policy covering the entire school bulding and the property of Paskewitz and/or Brethren, at its own expense. Paskewitz shall have the School District named as a loss payee on such insurance.

Subd b. *Personal Property of School District.* The School District shall be solely responsible for obtaining, at its own expense, insurance sufficient to cover its personal property located within the school building.

Section 2. *Liability Insurance.* Brethren and Paskewitz shall at their own expense keep in full force and effect during the term of this Agreement a public liability insurance policy naming the School District as an additional insured, protecting Brethren, Paskewitz and the School District from liability to any person for personal injury or property damage arising out of, connected with, or relating to the use of the building as a school provided for herein. The limits of said policy shall be in accordance with Minn. Stat. Ch. 466, as amended, or the limits of any public liability policy maintained by the School District, whichever is greater.

Section 3. *Additional Requirements for Insurance Policies.* Any insurance policies required pursuant to this Article shall contain a clause requiring the insurer to give the School District at least thirty (30) days prior written notice of any alteration of the terms of such policies or the cancellation thereof.

Section 4. *Certificates of Insurance.* Brethren and/or Paskewitz shall provide the School District with certificates of any and all insurance required pursuant to this Article.

IV. INDEMNIFICATION

Section 1. *Indemnification by Brethren.* Brethren and Paskewitz shall defend, indemnify, and hold harmless the School District, its officers, agents and employees harmless from and against any and all claims, any liability, loss, cost, damage and expense, including attorneys' fees, by reason of personal injury or property damage to any person or persons, including property damage to the school building, resulting from or connected with the exercise of the School District of its rights under this Agreement.

V. DURATION AND TERMINATION

Section 1. *Duration.* This Agreement shall be for a period of three years, commencing on July 1, 1993 and terminating on June 30, 1996.

Section 2. *Termination.* Notwithstanding Section 1 of this Article, either party may terminate this Agreement at the end of any school year during the term of this Agreement by giving written notice to the other party of its intent to termination the Agreement by January 15th of the year of termination (i.e. notice of termination given by January 15, 1994, would terminate the Agreement effective June 30, 1994).

VI. NOTICES; AMENDMENTS; INTERPRETATION; SAVINGS CLAUSE

Section 1. *Notices.* All notices required to be given by one party to the other parties under this Agreement, unless specifically provided otherwise, shall be in writing and sent by registered or certified mail addressed to the individuals designated below:

WHEREFORE, this Agreement was entered into on the date first referred to herein and the parties, by their duly authorized officers, have hereunto set their hands and seals on said date.

INDEPENDENT SCHOOL DISTRICT No. 640 WABASSO, MINNESOTA	BRETHREN
By: /s/ [Illegible]	By /s/ Ron Paskowitz Its:
By: /s/ [Illegible]	/s/ Lloyd Paskowitz LLOYD PASKOWITZ

APPENDIX F

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX G

MINN. STAT § 126.699 (1993)

Each school district shall have a procedure for a parent, guardian, or an adult student, 18 years of age or older, to review the content of the instructional materials to be provided to a minor child or to an adult student and, if the parent, guardian, or adult student objects to the content, to make reasonable arrangements with school personnel for alternative instruction. Alternative instruction may be provided by the parent, guardian, or adult student if the alternative instruction, if any, offered by the school board does not meet the concerns of the parent, guardian, or adult student. The school board is not required to pay for the costs of alternative instruction provided by a parent, guardian, or adult student. School personnel may not impose an academic or other penalty upon a student merely for arranging alternative instruction under this section. School personnel may evaluate and assess the quality of the student's work.

FILED
MAR 25 1998
CLERK

No. 97-1381

In The

Supreme Court of the United States

October Term, 1997

MATTHEW STARK and MARCIA NEELY,

Petitioners,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 640,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the operation of a public school, operated exclusively by a public school district, offering the same secular public school curriculum as is offered throughout the district and open to all students is consistent with the Establishment Clause?

2. Whether a public school district's neutral policy, now mandated by Minnesota law, Minn. Stat. Ann. § 126.699, of accommodating all reasonable parental requests for curriculum exemptions and alternative instruction for their children, regardless of motivation, is consistent with the Establishment Clause?

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STATEMENT OF THE CASE

This case involves a *public school district* employing *public school teachers* to teach the school district's *standard public school curriculum* in a *public school.* It also involves the operation of a state-mandated neutral policy of accommodating all parental curriculum objections. Petitioners, however, misrepresent the central facts of this case, the applicable law, and the sound decision of the United States Court of Appeals for the Eighth Circuit in *Stark v. Independent School District No. 640*, 123 F.3d 1068 (1997). As a result, the purported question that Petitioners present to this Court is founded solely on these factual distortions, and bears no resemblance to the real issues in this case.

Specifically, Petitioners contend that this case involves the opening of a religious school by a public school district, which is operated exclusively for the benefit of one sect, where strict religious separatism is enforced by the school district, and where the district has purposely and materially altered the curriculum in order to conform to a particular religious dogma. These fantastic suggestions are, of course, all falsehoods. Petitioners' contentions have no support in the record and are contrary to the real facts of this case which are clearly recited in the Eighth Circuit Court's decision. The petition, therefore, is founded on little more than the assertions of *factual error*, and presents no cause for this Court's review.

The true facts of this case do not give rise to any violation of the Establishment Clause. This case concerns a public school operated by Independent School District No. 640 in Vesta, Minnesota ("the School District" or "ISD 640"). The Vesta school is a *public school in all respects*, open to any student who wishes to attend. It is under the complete control of the public school district, and offers the same secular curriculum as the other public school operated by the School District (the Wabasso school). The School District *alone* has full authority over the Vesta school and is responsible for hiring and supervising teachers, providing the curriculum, and selecting all books and instructional materials.

Since 1985, the School District has had a neutral policy — now mandated by Minnesota state law, Minn. Stat. Ann. § 126.699 — of accommodating parental requests for exemption from aspects of the public school curriculum that violate the consciences of parents and/or their children. ISD 640 has implemented its neutral policy on numerous occasions in the past, granting various requests of other parents for exemption. In this case, the parents of individual students attending the Vesta public school requested exemptions from computer and technology education. These individual requests were granted — as they had been at the Wabasso school[1] — and alternative education was provided.

The Eighth Circuit Court's decision correctly held that operating a public school and implementing a state-mandated neutral accommodation policy do not violate the Establishment Clause. The court's decision properly reversed an unprecedented district court opinion permanently closing down a Minnesota public school and enjoining the operation of ISD 640's longstanding neutral policy, now mandated by Minnesota law, of granting conscience-based parental requests for exemption of their children from aspects of public school curriculum. The Eighth Circuit Court's decision is founded solidly on the well-established case law of this Court, and is consistent with the law of all other federal courts.

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1. In their brief, Petitioners state that ISD 640's neutral policy operates throughout the district and that these particular exemption requests had also been accomodated at the Wabasso school. *Petition for Certiorari* at 3. However, Petitioners never explain why the same exact policy that is constitutional when employed at the Wabasso school, somehow becomes unconstitutional 14 miles away at the Vesta school. In truth, whether the students are accommodated at the Vesta school or Wabasso School is of no constitutional moment. Most recently, this Court recognized in *Agostini v. Felton*, 117 S. Ct. 1997 (1997) that it is neither "sensible" nor "sound" to propound a legal doctrine in which "the only difference between a constitutional program and an unconstitutional one is the location of the classroom . . . ." *Id.* at 2012.

A. The Petition Misrepresents The Central Facts of This Case.

Petitioners misrepresent the most basic facts of this case. As outlined below, even more telling than the facts Petitioners attempt to distort are those they fail to reveal to this Court. Indeed, Petitioners' brief amounts to little more than a claim of factual error. This Court's Rules, however, are clear: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." United States Supreme Court Rule 10. Petitioners' eleventh-hour attempt to reargue the facts of this case — which Petitioners themselves recognized as undisputed below[2] — is far too late and certainly does not merit Supreme Court review. A petition for certiorari should not be granted based on claims of alleged factual errors, especially when those claims have absolutely no support in the record.

1. *The Vesta School Is A Public School In All Respects.*

Independent School District No. 640 is a public school district located in rural southwestern Minnesota and covers approximately

2. Petitioners' application for a writ of certiorari is founded on an alleged factual dispute. However, in every other brief filed by the Petitioners in this case, including all of their briefs on appeal, they stipulated that the facts of this case are undisputed and repeatedly stated so. Indeed, Petitioners filed their own motion for summary judgment in the district court. Petitioners *never* objected to any of the record evidence or testimony, including any affidavits. Further, during oral argument on cross summary judgment motions in the district court, after the close of discovery and in light of all record evidence, counsel for the Petitioners expressly stated that *"one of the few things the parties agree on is that the facts are undisputed,* and I think the core nucleus of facts is relatively small." Transcript of Summary Judgment Argument at 3 (Appendix C). If a Petition for Certiorari is not to be based on alleged factual errors, then *a fortiori* it cannot be the appropriate vehicle for factual disputes that were never raised during the entire proceeding in the district court, nor ever suggested during the appeal of this case.

225 square miles of sparsely populated, primarily agricultural land, which includes the towns of Vesta and Wabasso. School District enrollment in the elementary grades is approximately 200 students per year. The School District operates two public schools, one in Wabasso and one in Vesta.[3]

The Vesta school is a *public school* in all respects. *Stark v. ISD 640*, 123 F.3d 1068, 1073-74 (8th Cir. 1997). As the Eighth Circuit Court correctly found, the Vesta school is open to any student who wishes to attend. *Id.* The uncontradicted record establishes that ISD 640 has given all students in the district their choice of either school; no one has ever been turned away from either Vesta or Wabasso.[4]

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3. For several years prior to 1984, ISD 640 operated a public elementary school in Vesta. In May, 1984, however, the School District was forced to close the school for economic reasons. *Stark v. ISD 640*, 123 F.3d at 1070. During the 1992-93 school year, a group of Vesta parents approached School Superintendent George Bates about the possibility of reopening a public elementary school in Vesta. The undisputed facts establish that each of these individual parents had particular secular reasons for requesting the reopening of a public school in Vesta and, ultimately, for deciding to send their children to the Vesta school. *Id.* at 1071. The School Board discussed the proposal to reopen a public school in Vesta and held several public meetings regarding the proposal. *Id.* at 1071. The Board ultimately decided to reopen the Vesta public school using a multi-age classroom. There were also multi-age classrooms at Wabasso. The uncontraverted record establishes that the School District decided to reopen the Vesta school for purely secular reasons including numerous educational and financial reasons. This Court made clear forty years ago that "[i]t is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." *Everson v. Bd. of Educ.*, 330 U.S. 1, 7 (1947).

4. The record is undisputed on this point: every student in the School District has been able to attend the public elementary school of

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Like the Wabasso school, the School District *alone* has sole and complete authority over all aspects of the Vesta public school including, but not limited to, operating the school; hiring, supervising, and evaluating teachers and teachers' aides;[5] setting the curriculum and selecting all books and other instructional materials used at the school. *Id.* at 1071. Therefore, Petitioners' false claim that the Vesta public school is some sort of "joint venture" between ISD 640 and a religious group is utterly without factual support.[6] Indeed, it is flatly contradicted by the overwhelming and — up until now — undisputed record evidence.

(Cont'd)
his or her choice. No student has ever been denied the opportunity to attend the Vesta school. Indeed, contrary to Petitioners' unsupported assertions, in May 1993 the School District solicited students from throughout the district for its multi-age classrooms for the 1993-94 school year, including for the multi-age classroom at the Vesta school. This was made clear in the testimony of the school superintendent. The opening of the Vesta public school had also been repeatedly announced to the public at several open hearings conducted by the School Board. Fifty-four students registered for multi-aged classrooms for the 1993-94 school year. Thirty-five students applied for the Wabasso multi-age classrooms; nineteen applied for the Vesta multi-age classroom. The School District was able to honor the requests of *all students* regarding their choice of schools.

5. The two teachers at the Vesta school were, of course, hired without regard to religion. Ironically, it is only Petitioners themselves who have ever been interested in the religious beliefs of everyone affiliated with the Vesta school, including School Board members, teachers, students, and parents. During discovery in the case, Petitioners questioned both teachers about their personal religious beliefs and established for the record that neither of them subscribes to the "Brethren" belief system. (Both are Lutherans.) Further, the School District does not collect information, nor does the record contain information, concerning the religious beliefs of the students at either the Vesta or Wabasso schools.

6. In fact, Petitioners' suggestion that the Vesta school is some
(Cont'd)

ISD 640 exercises precisely the same rights and authority at the Vesta school as it does at the Wabasso school. The parents of the students at the Vesta school are accorded the same rights as the parents of students at the Wabasso school — no more, no less. Any student in the district who wishes to attend either the Vesta school or the Wabasso school may do so.

(Cont'd)

sort of a "joint enterprise" with a religious sect is belied not only by the entire factual record, but also by the only piece of evidence that Petitioners claim somehow supports this contention. Specifically, the Lease that Petitioners attempt to rely on, even to the extent it is relevant, expressly provides that: (1) the Vesta school shall be operated exclusively by the School District and shall be "a public school for any resident student" in the district (Art. I, § 1); (2) the School District is solely responsible for hiring and supervising teachers and teaching staff (Art. I, § 2); (3) the School District *alone* establishes the curriculum and rules for the Vesta school, "in compliance with state laws and rules" (Art. I, § 4); (4) the School District alone is responsible for selecting and providing "such classroom materials as it deems necessary for the instruction of students" (Art. I, § 5); (5) the School District retains the "sole discretion" regarding approval of any textbooks or instructional materials (Art. I, § 5); (6) "All policies adopted by the School Board of the School District . . . shall apply" at the Vesta school (Art. I, § 11); (7) no religious symbols or artifacts would be displayed at the school and no religious instruction would take place (Art. II, § 9); and (8) any requested exemption from computer education at the school would be granted only "to the extent permitted under applicable law and rules and regulations adopted by the School Board of the School District" (Art. I, § 6). *See also Stark v. ISD 640*, 123 F.3d at 1071. The document cited by Petitioners, therefore, only confirms the other voluminous and uncontradicted record evidence proving that the Vesta school is a public school in all respects, and that the School District's neutral exemption policy operates in the same manner at the Vesta school as it does at Wabasso. Further, in granting the lessor's Motion to Dismiss early in the case, even the district court found that the Lease, on its face, did not violate any constitutional provisions.

2. *ISD 640 Offers The Same Secular Curriculum — Including Technology Instruction — At The Vesta And Wabasso Schools.*

The academic curriculum offered by ISD 640 at the Vesta school is the same secular curriculum the district offers at Wabasso and "has not been altered in any way." *Stark v. ISD 640*, 123 F.3d at 1074. This includes computer and audio/visual instruction which, as the Eighth Circuit Court affirmed, are available as part of the curriculum offered at the Vesta school.[7] *Id.* In fact, computers, a copy machine, a fax machine, and other electronic equipment are physically present and used in the Vesta school. Religion plays no role at the Vesta or Wabasso schools: no religious instruction takes place and no religious symbols or artifacts are present at either school. *Id.* at 1072.

In addition to employing the same secular curriculum, all School District policies apply equally at the Wabasso and Vesta schools. In short, computer education — the only aspect of the Vesta curriculum that Petitioners have placed at issue in this case — is offered as part of the curriculum at the Vesta school. Indeed, contrary to Petitioners' contention, not all current students at the

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7. Contrary to the undisputed testimony in the record from numerous witnesses, including the school superintendent and the two teachers employed at the Vesta school, petitioners now make the unsupported claim that technology is not available at the Vesta school. In addition to the voluminous and uncontradicted record evidence establishing that computer, technology, and audio/visual education is available at the Vesta school, an amicus brief submitted below on the School District's behalf by unanimous vote of the Wabasso Education Association ("WEA") (the local teachers' union) included photographs of the computer equipment, fax machine, and other technological equipment available to students *in the classroom at the Vesta school.* All 29 local teachers who belong to the WEA and teach in ISD 640 voted to file their amicus brief because they were "appalled at the factual misrepresentations present" in the Petitioners' briefs below and now in this Court, which "do not describe what exists in Vesta, Minnesota."

Vesta school have requested an exemption from the computer curriculum and the computer equipment available at Vesta is being used.

3. *ISD 640's Neutral Policy Of Accommodating Parental Exemption Requests, Mandated By Minn. Stat. Ann. § 126.699, Operates In The Same Way At Both The Vesta and Wabasso Schools.*

Since 1985, the School District has had a policy of accommodating parental requests for exemption from aspects of the curriculum that violate the consciences of parents and/or their children. Minnesota state law now requires all school districts to establish such a neutral procedure to accommodate conscience-based parental requests for exemption from public school curriculum and instructional materials. Minn. Stat. Ann. § 126.699. It is undisputed that, over the years, ISD 640 has received numerous objections to aspects of the curriculum from various parents and students and, consequently, many requests for exemptions and alternative instruction. Examples include requests for exemptions from drug education, self-esteem training, computer use, certain books, certain audio and visual presentations, and sex education. *Stark v. ISD 640*, 123 F.3d at 1074.

When parents make a reasonable request for exemption from an aspect of the public school curriculum, the School District — as it must under state law — routinely grants the exemption and arranges for alternative education. There is no evidence that the School District has ever denied such a request. To the contrary, the record establishes that ISD 640 has implemented its neutral policy on numerous occasions in the past, granting the various exemption requests of other parents, regardless of motivation. *Stark v. ISD 640* at 1074. From the School District's perspective, the parental motivation for particular exemption requests — religious or otherwise — is immaterial, because Minnesota state law requires school districts to accommodate all reasonable parental requests

for exemption. The School District simply takes such requests at face value, assumes the good faith of local parents, and attempts to accommodate them. *Id.* at 1074 ("The record shows that the district honors all parental exemption requests, regardless of motivation."). Further, the record reflects — and current Minnesota state law requires — that ISD 640 will continue to implement its neutral policy to accommodate future reasonable parental exemption requests.

Faced with a record replete with evidence supporting the Eighth Circuit's decision, Petitioners attempt to conjure up an argument by focusing on portions of one letter written by a private citizen.[8] However, they ignore the testimony of the members of the School Board who made the decision to open the Vesta public school after several public hearings and in full compliance with the law. The only actions that are relevant here — as in any case alleging a constitutional violation — are those of the state actor,

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8. Petitioners rely almost exclusively on a letter written by Lloyd Paskewitz, a private citizen and the lessor of the classroom space that houses the Vesta school. Even on its face, however, this letter does not support Petitioners' misrepresentations. To the contrary, the letter shows that Mr. Paskewitz, along with everyone else, understood from the beginning that the Vesta school would be a *public school with a secular curriculum*, run exclusively by ISD 640, and open to all children. It states that "[w]e have no objection to it being a public school," and that "[w]e have also heard that there might be others besides the Brethren that would want their children enrolled at Vesta." However, the real point is that this letter is irrelevant to the *only* issue in this case: whether a *state actor* — the School District — has taken actions that somehow violate the Establishment Clause. No private citizen's actions — neither those of Mr. Paskewitz nor of anyone else — are at issue. Indeed, early in this litigation the district court itself dismissed Petitioners' claims against Mr. Paskewitz. In doing so, the district court found that on its face the Lease between Mr. Paskewitz and the School District did not violate the Constitution. Petitioners never appealed this ruling.

ISD 640. Private citizens cannot violate the Establishment Clause.[9] Petitioners can cite absolutely no evidence of any improper motivation or action on the part of ISD 640. The Eighth Circuit's opinion is well-founded on uncontraverted record evidence, including numerous relevant documents, discovery responses, and the testimony of over twenty witnesses, among them two successive school superintendents, members of the School Board, both Vesta teachers, a number of area parents, and even experts. Petitioners ignore this record, and do not provide a single record cite in support of their false version of the facts. Consequently their petition presents this Court with a new-found and unsupported factual dispute.

B. Proceedings Below

Petitioners — who live nearly 100 miles away from the Vesta school and have no children in the school system — commenced this suit nearly three years ago seeking to have the Vesta public school closed by court order and to prevent ISD 640 from implementing its neutral accommodation policy that is mandated by state law. They filed suit in a court far away from ISD 640, and

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9. As the Eighth Circuit Court correctly determined, the fact that the School District's actions "coincide with the desires of certain parents does not mean that the Establishment Clause has been violated." *Stark v. ISD 640* at 1075 (8th Cir. 1997). *See also Bowen v. Kendrick*, 487 U.S. 589, 603, n.8 (1988) (statute does not violate the Establishment Clause "simply because some of the goals of the statute coincide with the beliefs of certain religious organizations"); *Clayton by Clayton v. Place*, 884 F.2d 376, 380 (8th Cir. 1989) (finding "no support" for the proposition that government action "becomes unconstitutional due only to its harmony with the religious preferences of constituents"). Nor, as Petitioners seem to suggest, do citizens lose their fundamental right to petition the government simply by virtue of their religious beliefs, or because they have a personal religious motivation for doing so. *See Clayton*, 884 F.2d at 380 (religious groups "have an absolute right to make their views known and to participate in public issues").

sued not only the School District, but also each member of the School Board and several Vesta parents. They even seemingly attempted to sue the adherents of an entire religion (although they apparently never attempted proper service). During this case, Petitioners conducted extensive discovery, including several depositions, numerous affidavits, requests for voluminous documents, and numerous interrogatories (none of which Petitioners even reference in their brief). Defense of the case has required hundreds of pages of briefs in each of at least six separate briefings in three Courts. The public school system in ISD 640 has been disrupted. The energies and resources of school administrators, teachers, parents and students have been drained.

ISD 640 was the only defendant remaining in the case by the time cross-motions for summary judgment were filed in the district court. On August 22, 1996, the district court — in an unprecedented holding — granted summary judgment to the Petitioners and issued a vague and sweeping injunction closing the Vesta public school and preventing the School District from implementing its neutral policy of granting parental exemption requests. Because this neutral accommodation policy is now mandated by Minn. Stat. Ann. § 126.699, the district court's ruling called into question the constitutionality of that law. In addition, the broad injunction prevented the operation of this policy at "any school," threatening not only the other public school in the district at Wabasso, but also implicitly calling into question the constitutional legitimacy of all other public schools in Minnesota where the law is implemented.

Moreover, in holding expressly that the operation of a *public school* by a public school district "lacks a secular purpose," the district court's ruling stood virtually alone in the entire history of Establishment Clause jurisprudence, and contradicted the overwhelming weight of Supreme Court and Eighth Circuit precedent. Indeed, as the Eighth Circuit Court recognized, the district court's decision was errant in many respects, not the least

of which was that it relied primarily on the portion of *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), that was explicitly overruled by *Agostini v. Felton*, 117 S. Ct. 1997, 2006-2017 (1997), subsequent to the district court's decision.

The district court ordered the closing of the Vesta public school just days before the school was scheduled to reopen for fall classes. ISD 640 requested a stay of the ruling on the logical grounds that the immediate closing of one of only two public schools in ISD 640 on such short notice would have caused substantial disruption for the district and its students. Nevertheless, ISD 640's request for a stay was summarily denied by the district court.

On emergency motion by ISD 640, the Eighth Circuit Court issued a stay pending appeal. Ultimately, the Eighth Circuit reversed the unprecedented district court holding and properly decided the case applying the well-settled Establishment Clause law of this Court. Petitioners' request for *en banc* rehearing of the case was denied.

REASONS FOR DENYING THE WRIT

Petitioners' legal arguments are founded solely on their baseless claims of factual error and do not warrant Supreme Court review. The Eighth Circuit Court's opinion is based solidly on — and indeed compelled by — the settled and sound precedent of both the Eighth Circuit and this Court.[10] Petitioners' contortion of the

10. The Eighth Circuit correctly held that ISD 640's neutral actions fully comply with the requirements of the *Lemon* test. *Stark v. ISD 640* at 1073-1075, *citing Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The Court found that ISD 640's actions had a number of valid secular purposes, did not have the primary effect of advancing or endorsing religious beliefs, and did not result in "excessive entanglement," but instead promoted "*less*, rather than *more* involvement

(Cont'd)

facts to bolster their strained legal arguments is a tacit but telling admission that they have no constitutional argument under the real facts of this case. Indeed, Petitioners fail to cite any of the record in this case. Petitioners nevertheless cite three reasons they claim support their application for a writ — each of which is already directly addressed and properly refuted in the Eighth Circuit Court's opinion. They are considered in turn below.

I. THE EIGHTH CIRCUIT COURT'S OPINION IS CONSISTENT WITH *EPPERSON* AND *EDWARDS*.

This is not a Creationism case. Petitioners nevertheless make the misguided argument that the Eighth Circuit's decision here conflicts with *Edwards v. Aguillard*, 482 U.S. 578 (1986), and *Epperson v. Arkansas*, 393 U.S. 97 (1968). The *Epperson* Court struck down an Arkansas statute criminalizing the teaching of the theory of evolution to *any* student in any public school or university in the state. In *Edwards*, the Court invalidated the Louisiana Creationism Act, which required creationism to be taught to all students in public elementary and secondary schools where evolution was taught. Both *Epperson* and *Edwards*, then, involved the state-mandated alteration of the substantive curriculum of every public school for *all students* in those schools. As the Eighth Circuit

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(Cont'd)
with religion." *Id.* As the Court stated, the School District's actions fall "well within the boundaries" of Supreme Court cases interpreting the Establishment Clause. *Id.* at 1075. *See, e.g., Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1983) (providing sign language interpreter to deaf student at Catholic high school upheld); *Mueller v. Allen*, 463 U.S. 388 (1983) (Minnesota's neutral tax deduction for educational purposes did not violate the Establishment Clause even though parents could deduct parochial school expenses). Further, the most recent Supreme Court decision analyzing the Establishment Clause, *Agostini v. Felton*, 117 S. Ct. 1997, which the Eighth Circuit cites in its opinion, clearly teaches that ISD 640's neutral actions in this case fall well within constitutional boundaries.

properly held, "nothing of the sort has happened here." *Stark v. ISD 640*, 123 F.3d at 1074.

In this case "the district's curriculum has not been altered in any way at the Vesta school, and the same curriculum is taught at Vesta as at the Wabasso school." *Id.* The Eighth Circuit Court, therefore, correctly found *Epperson* and *Edwards* to be completely inapplicable here because:

> the curriculum — whether the substantive curriculum or the availability of technology — has not been modified or changed in any way at the Vesta school from what is taught at the Wabasso school.

Stark v. ISD 640 at 1074 (8th Cir.). Accordingly, because *Epperson* and *Edwards* dealt specifically with a blanket alteration of the curriculum of *all* public schools for *all* students, they are inapposite. Petitioners' central argument, therefore, founded entirely on a fundamental factual dispute, falls under its own weight given the true facts of this case. *Epperson* and *Edwards* are not even implicated here, much less offended.

Moreover, Petitioners' argument is based neither in law nor in logic — but solely on an awkward and transparent semantic trick. Petitioners contend that the very act of accommodating reasonable individual exemption requests pursuant to a neutral policy — standing alone — somehow *ipso facto* constitutes a broad based curriculum alteration for all students. According to Petitioners, the exemption of any individual student from any aspect of the curriculum pursuant to a state-mandated neutral accommodation policy *per se* constitutes a universal alteration of the public school curriculum of the kind struck down in *Epperson* and *Edwards*.

But to state this argument is to refute it. In this case, individual parents at the Vesta school have requested a conscience-based

exemption from an aspect of the curriculum offered at the school. Accommodating these parental requests pursuant to a state's neutral policy does not affect either the substance of the curriculum that continues to be offered at the Vesta school or the content of any other student's education. Nor do private individual choices made pursuant to a neutral policy somehow constitute state action. Indeed, if Petitioners' flawed reasoning were accepted, then accommodating any student at any public school would per se constitute an unconstitutional "curriculum alteration" as wrongly understood by Petitioners. This would not only invalidate ISD 640's policy and Minnesota's statute, but any attempt anywhere to accommodate on a neutral basis the consciences of individual parents and students. Fortunately, this is not supported, much less compelled, by existing law.[11]

Petitioners also wrongly assert that the court's decision in this case somehow "conflicts" with certain decisions of other federal courts. However, none of the few cases Petitioners cite remotely support their contention. For example, Petitioners point to *Parents Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235 (2nd Cir. 1986), which, on its facts, is manifestly inapposite.[12] *Quinones* involved the closing off of an entire section of a public school and allowing

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11. This Court has long held that government may — and sometimes must — accommodate religious practice and may do so without offending the Establishment Clause. *See, e.g. Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Zorach v. Clausen*, 343 U.S. 306, 312-14 (1952); *See also HSU v. Roslyn Union Free School Dist.*, 85 F.3d 839, 864-67 (2d Cir. 1996); *Spence v. Bailey*, 465 F.2d 797 (6th Cir. 1972). In fact, the court has held — contrary to what Petitioners urge here — that religious individuals may not be *excluded* from neutrally available benefits simply because of their religious beliefs. *See, e.g. Rosenburger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995).

12. The actions at issue in *Quinones* were an effort to comply with the requirements of *Aguilar v. Felton*, which, as discussed, was overruled in *Agostini*.

access only to Hasidic girls and no other students. The Hasidic girls were given a separate entrance to the school building so as to avoid all contact with other students. Only female teachers were allowed to instruct the girls and they were taught in Yiddish. *Id.* at 1237, 1241. Thus non-Hasidic children (indeed, even Hasidic boys) were physically excluded from an entire section of the public school, as were male teachers, because of the tenets of the Hasidic faith. *Id.* at 1241.[13]

Obviously, *Quinones* is not pertinent here because "the Vesta school does not involve the complete segregation and dedication of part or all of a public facility to a group of students for religious reasons as in *Quinones*." *Stark v. ISD 640*, 123 F.3d at 1074. No one is excluded from attending the Vesta School because of religion or gender. No one is excluded from teaching at Vesta because of religion or gender. In short, *Quinones* does not apply.

The only other cases cited by Petitioners involved interpretations of the Free Exercise Clause, not the Establishment Clause. *Swanson v. Guthrie Independent School District No. I-L*, 135 F.3d 694 (10th Cir.) (school district's refusal to allow part-time class attendance and part-time home schooling did not violate student's free exercise rights); *Battles v. Anne Arundel County Board of Education*, 904 F. Supp. 471 (D. Md. 1995) (free exercise clause was not offended by Maryland's system of limited state monitoring of home schooling); *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1064 (6th Cir. 1987), *cert. denied*,

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13. Similarly, in *Bollenbach v. Board of Education*, 659 F. Supp. 1450 (S.D.N.Y. 1987), also cited by Petitioners, a district court found unconstitutional a school district's decision to assign only male bus drivers with less seniority on routes encompassing a Hasidic community in order to accommodate Hasidic beliefs requiring separation of the sexes. 659 F. Supp. at 1464. The case, brought by female bus drivers, turned on the rights of bus drivers to be free of sex-based discrimination. On its own terms, the case is inapplicable.

484 U.S. 66 (1988) (free exercise clause does not *require* a school district to exempt students from being exposed to ideas expressed in a particular set of readers).[14] As one might generally expect, it is somewhat difficult for cases involving interpretations of *different* constitutional provisions to "conflict" as petitioners claim. Again, all of these cases involved claims by individuals to compel school districts to take actions because of the Free Exercise Clause; they did not involve Establishment Clause challenges to neutral school district action. Further, each case affirms the broad discretion of local School Boards. Petitioners' reliance on them proves nothing except their own misunderstanding of this case.

In essence, the issue presented by this case is not whether ISD 640 or the state of Minnesota *must* grant conscience-based parental exemption requests, but whether the School District and the state *may* in their discretion decide to do so pursuant to a neutral statute or policy. This is not a case about what is *required* by the Free Exercise Clause, but what is *permitted* by the Establishment Clause. Here, ISD 640's actions not only fully comply with the requirements of the Establishment Clause, but, as the Eighth Circuit Court found, exemplify the concern for neutrality that is at the heart of this Court's Establishment Clause jurisprudence.[15] Because

14. Petitioners also inexplicably cite *Bauchman v. West High School,* 900 F. Supp. 254 (D. Utah 1995), which involved both Free Exercise and Establishment Clause claims brought by a student in a public high school choir because of the music teacher's choice of certain explicitly Christian religious music and Christian religious sites for performances of the school's a'cappella choir. The court held that there was no Establishment Clause violation. Further, the court found no Free Exercise violation precisely because the school in that case accommodated the student's objections by excusing her from participation in activities she or her parents found objectionable.

15. This Court has stated that "[a] central lesson of our decisions is that a significant factor in upholding government programs in the (Cont'd)

this case is about what a School District *may* do, not what it *must* do, the Free Exercise cases cited by Petitioners are not even on point and certainly not in conflict with the Eighth Circuit's decision.

II. THE EIGHTH CIRCUIT'S OPINION IS CONSISTENT WITH KIRYAS JOEL.

Petitioners' assertion that this case is contrary to *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994), misconstrues both *Kiryas Joel* and this case. "This case is not *Kiryas Joel*." *Stark v. ISD 640* at 1075 (8th Cir. 1997). And despite the claims in their recent brief, at oral argument before the Eighth Circuit Court, counsel for Petitioners took a much different view of *Kiryas Joel* and its application to this case:

> Judge Wollman: ". . . Where in this case is the delegation of state authority to a religious group that existed in *Kiryas Joel*? Does it exist here?"
>
> Mr. Bruno: "Not the delegation, no."[16]

(Cont'd)
face of Establishment Clause attacks is their neutrality toward religion." *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 839 (1995). The Court has "frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges." *Id. quoting Kiryas Joel*, 512 U.S. at 703 (Souter, J.). ISD 640's actions are "well within the boundaries set by cases in which the Supreme Court has upheld government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion." *Stark v. ISD 640*, 123 F.3d at 1076, *quoting Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

16. As Petitioners themselves established through discovery, no individuals subscribing to what Petitioners describe as the "Brethren" belief system has any authority whatsoever over the operation of the (Cont'd)

> Judge Wollman: "Where in this case is the drawing of a district line to exclude others than the Brethren."
>
> Mr. Bruno: "We don't think that a political line has been drawn."
>
> Judge Wollman: "Weren't both of those considerations powerful incentives to the Court's decision in *Kiryas Joel*?"
>
> Mr. Bruno: "Those were some of the considerations. I think there were other considerations in *Kiryas Joel*. ***But I don't think Kiryas Joel is our strongest case here.***"

Transcript of Oral Argument at 20 (emphasis added) (Appendix A).[17]

As was recognized by Petitioners' own counsel at oral argument, *Kiryas Joel* is inapposite. "[T]he record does not support

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(Cont'd)
Vesta public school. It is undisputed that no member of the School Board subscribes to religious beliefs of the Brethren, and no member of the Brethren ever has or ever will serve on the School Board, because it is against their beliefs to participate in any political activities, including voting. Therefore, adherents of this belief system have absolutely no authority over ISD 640 or the operation of the Vesta public school. Certainly, there has been no "delegation" of state authority to a religious group of the sort at issue in *Kiryas Joel*.

17. Indeed, in a brief filed recently by counsel for Petitioners in another Establishment Clause case, counsel for Petitioners describes the *Stark* case as one involving application of a neutral state policy "because the benefits of the statute under consideration were generally available." *See* Brief in Support of Motion for Summary Judgment, *Children's Health Care is a Legal Duty, Inc. v. DeParle*, at p. 25 (Appendix B).

Stark's and Neely's contention that the district has taken special actions to wrongly benefit the Brethren. . . ." *Stark v. ISD 640*, 123 F.3d at 1075 (8th Cir.). Here, ISD 640's actions are entirely neutral and only provide benefits that are generally available to any parent. Any parent can send a child to the Vesta public school, and any parent can object to elements of a child's curriculum and receive alternative instruction for a child.

Further, unlike *Kiryas Joel*, the record in this case establishes that ISD 640's policy of accommodation has been implemented by ISD 640 many times in the past for other parents requesting a variety of exemptions. *Id.* at 1072. As noted in *Kiryas Joel* itself, 512 U.S. at 687, 703, the Court "has frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges." As the Eighth Circuit Court has already correctly determined, the factual record in this case is nothing like *Kiryas Joel*.

Finally, Petitioners also vaguely raise the specter of "endorsement." However, the suggestion that ISD 640's actions in this case somehow constitute an endorsement of anyone's religious beliefs ignores the factual record and mistakes the true nature of "endorsement analysis." Indeed, Petitioners do not even attempt to cite any record evidence to support their "endorsement" claim. The Eighth Circuit Court correctly held that "the district has acted neutrally in this case towards the citizens of the district regarding the decision to open the School in Vesta and in applying the exemption policy. Thus, the district has not made anyone's adherence to religion relevant to their standing in the community and consequently has not endorsed religion or a set of religious beliefs." *Stark v. ISD 640*, 123 F.3d at 1077. Petitioners' attempt to apply the "endorsement test" to a false version of the facts conflicts with this Court's description of that test. *See, e.g., Capital Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 772-80 (1995) (O. Connor, J., concurring) ("the endorsement test

necessarily focuses on the perception of a reasonable, informed observer" not a "casual passerby" who is mistaken about the facts). In short, under the endorsement test, "erroneous conclusions do not count." *Id.* at 764-66.[18] More to the point, this Court has stated that "as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion." *Id.* at 764. ISD 640's neutral actions do not come close to endorsement.

III. THE SCHOOL DISTRICT'S ACTIONS IN THIS CASE EXEMPLIFY THE IDEALS OF THE FIRST AMENDMENT.

The last argument Petitioners present is the unsupported suggestion that the Eighth Circuit's decision somehow approves "the balkanization of the public schools along religious lines" and undermines "cohesion" in the public schools. Like their other two arguments, this one is based exclusively on Petitioners' factual dispute with the Court below. Despite Petitioners' contentions, the School District's neutral actions in this case actually promote

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18. No one in the ISD 640 community has ever perceived the School District's neutral actions in this case to be an endorsement of anyone's religious beliefs. Indeed, all of the teachers in the local chapter of the state teachers union voted unanimously to support the School District in this case. Contemporaneous newspaper accounts, even to the extent they are relevant, made clear that the Vesta school is a public school that is open to any who wish to attend classes there. No local citizen has ever objected to the Vesta public school or the School District's neutral accommodation policy. In fact, many local parents have taken advantage of the policy. Only Petitioners — who live over 100 miles away from the Vesta public school — have ever objected to ISD 640's actions. With respect to "endorsement," this Court has stated that "we refer only to what would be thought by 'the community' — not by outsiders or by individual members of the community uninformed about the school's practice." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 764-66 (1995) (plurality opinion).

cohesion in the public schools and avoid any "divisive" disputes among parents, teachers, administrators and students.

ISD 640's accommodation of parental exemption requests at both the Vesta and Wabasso schools is conducted pursuant to a neutral, state-mandated policy, without regard to parental motivations. Thus, as a policy matter, the Minnesota legislature and ISD 640 have determined that the best approach in these matters is to respect the concerns of parents regarding the education of their children; to assume that the parents' conscience-based requests are made in good faith; to avoid searching inquiries by administrators into parental motivations for such requests; and to avoid discriminating among requests based on the substance of parental motivations. These neutral actions are well within the boundaries set by cases in which this Court has upheld "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion." *Stark v. ISD 640*, 123 F.3d at 1075.[19] The "district's actions in this case follow our best

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19. *See, e.g., Rosenberger,* 515 U.S. at 837-45 (neutral program for paying for printing of student publications) ("The guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."); *Zobrest v. Catalina Foothills Sch.* Dist., 509 U.S. 1, 8 (1993)(sign language interpreter for deaf student at Catholic high school); *Bowen v. Kendrick*, 487 U.S. 589, 608 (1988) (Adolescent Family Life Act did not violate the Establishment Clause despite the fact that religious organizations received funding pursuant to its neutral provisions); *Witters v. Washington Dep't of Servs. For the Blind*, 474 U.S. 481, 487 (1986) (vocational assistance to individual studying at Christian college did not violate the Establishment Clause); *Mueller v. Allen*, 463 U.S. 388, 398-99 (1983) (Minnesota's neutral tax deduction for educational expenses did not violate the Establishment Clause despite fact that parents could deduct parochial school expenses); *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981) (open access to university facilities).

traditions of accommodation of religious beliefs in the school context." *Id.* at 1076.

Ironically, only Petitioners' view would promote significant religious divisiveness and "balkanization," as they refer to it, in the public schools. In essence, Petitioners adopt the untenable position that a neutral statute like Minn. Stat. Ann. § 126.699 may operate in all cases, *except where parental requests for exemption are founded on religious beliefs.* This position not only conflicts with the settled legal principle that neutral statutes do not offend the Establishment Clause, but would itself destroy the neutrality of the existing statute, and in effect mandate discrimination based on religious beliefs and viewpoints. If Petitioners' views prevailed, and Minnesota school districts were forced to reject *only* those conscience-based parental requests for exemption based on religious beliefs, then administrators would have to conduct a searching inquiry into parental motivations as part of considering each requested exemption to determine if religious beliefs played any role, however minor, in a particular request. Apart from being impractical and divisive, this would require government to limit access to a general statutory policy based solely on the particular viewpoint of the citizen requesting an exemption, and would itself violate the Constitution. *See, e.g., Rosenberger,* 115 S. Ct. 2510 (individuals may not be excluded from neutrally available benefits simply because of their religious beliefs).

In any event, such a troubling policy is certainly not, as Petitioners contend, *required* by the Establishment Clause. In sum, ISD 640's neutral accommodation policy is not only constitutional, it works.

CONCLUSION

The Eighth Circuit Court's decision, founded squarely on the clear and substantial factual record in this case, rests solidly on Eighth Circuit and Supreme Court precedent. It should not be disturbed. Petitioners' assertions of factual error do not counsel Supreme Court review. This Court should not spend its scarce resources rehearing a case that has already been closely considered and properly decided, nor should it cause further expenditure of the scarce resources of a small rural school district. Clearly, such review is not justified based on Petitioners' new-found dispute with the factual record. For the reasons given, Petitioners' application for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED NOVEMBER 20, 1996

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3250 MNST

St. Paul, Minnesota
November 20, 1996
2:00 o'clock p.m.

Matthew Stark, Marcia Neely,

Plaintiffs/Appellees,

vs.

Independent School District, No. 640, and the members of its Board of Directors,

Defendant/Appellant,

Leon Plaetz, Curtis Trost, Scott Frederickson, Tom Franta, Barb Beranek, Alois Guetter,

Defendants.

TRANSCRIPT OF PROCEEDINGS
(ORAL ARGUMENT)

BEFORE THE HONORABLE ROGER L. WOLLMAN,
C. ARLEN BEAM, AND DIANA E. MURPHY
UNITED STATES COURT OF APPEALS

Appendix A

* * *

JUDGE WOLLMAN: That would be my next question. Where in this case is the delegation of state authority to a religious group that existed in *Kiryas Joel*? Does it exist here?

MR. BRUNO: Not the delegation, no.

JUDGE WOLLMAN: Where in this case is the drawing of a district line to exclude others than the Brethren?

MR. BRUNO: We don't think that a political line has been drawn.

JUDGE WOLLMAN: Weren't both of those considerations powerful incentives to the Court's decision in *Kiryas Joel*?

MR. BRUNO: Those were some of the considerations. I think there were other considerations in *Kiryas Joel.* But I don't think *Kiryas Joel* is our strongest case here.

* * *

APPENDIX B — EXCERPTS OF PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT DATED FEBRUARY 13, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civ. 97-1794

Judge Ann Day Montgomery

CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INCORPORATED, et al.

Plaintiffs

vs.

NANCY-ANN MIN DePARLE, et al.,

Defendants

and

FIRST CHURCH OF CHRIST, SCIENTIST,

Defendant-Intervenor

PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THE MOTIONS FOR SUMMARY JUDGMENT OF DEFENDANTS AND DEFENDANT-INTERVENOR

(ORAL ARGUMENT IS REQUESTED)

Appendix B

Dated: February 13, 1998.

Robert J. Bruno (#12415)
Attorney for Plaintiffs
ROBERT J. BRUNO, LTD.
1601 E. Hwy. 13, #107
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612/890-9171

* * *

There is recognition in the Conference Agreement and the briefs of the responding parties and their allied amicus curiae in this case that the RNHCI nursing services are not generally available. They are referred to as "comparable" in the Conference Agreement, Pl. Attachment 6, at 79, as they were described in the Conference Report in 1965. Defendants refer to them as "some benefit," Def. Mem., at 7, "limited health care benefits," *id.*, at 19, "needed health care services," *id.*, at 21, "nonmedical components of inpatient hospital care,"[16] *id.*, "alternative nonmedical benefit in lieu of benefits otherwise available for traditional medical care." *Id.*, at 23, n. 13.

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16. Defendants refer in footnote 11 to the unbundling of the nonmedical components of inpatient hospital services without explaining what they mean by these nonmedical components. Plaintiffs have submitted an affidavit that there are no such nonmedical components of hospital services in the medical setting. If Defendants are referring to the custodial care services described in the Robyn Filbert Affidavit filed by the Church, such unbundling is a benefit to which no one else is entitled and which would be highly prized by the residents of thousands of "board and care" facilities. In this respect this case is distinguishable from *Stark v. Independent School Dist. No. 640,* 123 F.3d 1068, cited in Defendants' Memorandum, note 13, because the benefits of the statute under consideration were generally available.

APPENDIX C — EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS DATED JUNE 7, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil 3-94-1597

St. Paul, Minnesota
June 7, 1996
9:00 o'clock a.m.

Matthew Stark and Marcia Neely,

Plaintiff,

-v-

Independent School District No. 640

Defendant.

TRANSCRIPT OF PROCEEDINGS
(MOTION)

BEFORE THE HONORABLE MICHAEL J. DAVIS
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

ON BEHALF OF PLAINTIFFS:

TIMOTHY BRANSON, ESQ.
ROBERT BRUNO, ESQ.

Appendix C

ON BEHALF OF DEFENDANT:

PAT A. CIPPOLLONE, ESQ.
ERICK KAARDAL, ESQ.
C. HUNTER WIGGINS, ESQ.

* * *

MR. BRANSON:

[3] * * *

What exactly they did, I think the facts, Your Honor, one of the few things the parties agree on is that the facts are undisputed, and I think the core nucleus of facts is relatively small.

* * *

97 1381 (3)

Supreme Court, U.S.
FILED
APR 16 1998
CLERK

No. 97-1318

In the
Supreme Court of the United States
October Term, 1997

MATTHEW STARK and MARCIA NEELY,
Petitioners,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 640,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY BRIEF

Respondent would have this Court believe that the opening and operation the Vesta school and the composition of its student body have nothing to do with religion. Instead, according to Respondent, the modification of the curriculum actually taught to conform to the Brethren's religious beliefs and the complete segregation of the Vesta school along religious lines are simply coincident facts. As the record reflects, however, Respondent contracted with the Brethren to open the Vesta school in a building owned by a Brethren member and operate that school with a curriculum modified to conform to the Brethren's religious objections to technology. Non-Brethren were not solicited to attend the Vesta School and only Brethren children have attended the Vesta school. Such segregation and religiously-modified curriculum are neither constitutional nor sound public policy. Whether the Vesta school was established under a state law or under a school district policy authorizing ad hoc accommodation of religion is constitutionally immaterial, because the principle of accommodation is not one without limits.

A. The questions raised by the petition may be decided as a matter of law based on the record before this Court.

Respondent's claim that the petition is based on disputed findings of fact, which is disfavored by S. Ct. Rule 10, Resp. Br. at 3, is a red herring. The district judge and the three circuit judges who heard this case all agree that summary judgment is appropriate, they simply divide 2-2 as to which side is entitled to summary judgment, once the law is applied to the facts. Accordingly, neither the weight of the evidence nor the credibility of witnesses is at issue. *Agosto v. INS*, 436 U.S. 748, 756 (1978) ("a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"). Instead, if

certiorari is granted, this Court will have the same concise, written record as the courts below -- affidavits, documents, and deposition testimony -- and no deference will be due the decisions below.[1]

In addition, because the issue of Church and State separation under the Establishment Clause is most often one of degree, *Board of Education v. Allen,* 392 U.S. 236, 242 (1968), an as-applied challenge will inevitably turn upon the facts of the case and an application of the law to the facts, and thereby involve this Court in an examination of the factual record made in the lower courts. Under Respondent's erroneous view of S. Ct. Rule 10, few if any, as-applied Establishment Clause cases would ever be reviewed by this Court.

B. Respondent's Brief in Opposition misrepresents the record below and rests on alleged facts outside of the record.

The Respondent's Brief In Opposition utterly fails, as it must, in its attempt to portray the Vesta school as an ordinary public school that just happens to be attended solely by Brethren children. Respondent attempts to explain the total religious segregation of students in the Vesta school, first by positing that non-Brethren were given a choice to attend the Vesta school;[2] and second, that such parental choice resulted in the coincidence that only the Brethren chose Vesta and everyone else chose Wabasso.[3] Even if

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[1] See also *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 501(1984) (Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.)

[2] The May, 1993 letter soliciting interest in a multi-age classroom to be taught at the Wabasso school, which Respondent claims is the letter that solicited interest in the Vesta school, did not mention the Vesta school. See Pet. at 3 n.1. Thus, quick review of one letter is all that is needed to confirm Respondent's factual misrepresentation.

[3] Appendices J through M from the record below undisputedly establish that the religious segregation which occurred here was the direct result of the school board's actions.

those were the facts, parental choice by non-Brethren residing in Vesta and elsewhere to send their children to a school in Wabasso with an educationally-appropriate curriculum, rather than a school where the curriculum had been modified to conform to the Brethren's religious objections to technology, is insufficient to demonstrate the constitutionality of the Respondent's opening and operation of the Vesta school. See Judge Murphy's dissent. App. A at 23a.

Respondent also addresses the deletion of technology from the curriculum at the Vesta school by making the contradictory arguments that such deletions did not occur, while at the same time asserting that the modifications were compelled by an unspecified ad hoc school district policy. Respondent's assertion that there exists some "voluminous, uncontradicted record of evidence that computer, technology, and audio/visual education is available at the Vesta School," Resp Brf. at 7 n. 7, is false. At the close of discovery when the Vesta School had been in operation for its third year, both of the half-time teachers testified in their depositions that computers and audio/visual devices were not present in the Vesta school, and they were instructed not to teach with such devices. See Appendices H and I. Respondent's assertion could only be true in the hypothetical sense, either by transportation of a student to Wabasso, or by the teacher's request for such devices for her classroom.

Respondent also attempts to rely on photographs attached to the *amicus curiae* brief of the Wabasso Education Association, filed *ex parte* on the eve of the oral argument in the Eighth Circuit, which are obviously not a part of the record of this case, and which counsel for the *amicus* confirms were taken after the close of discovery and after the district court enjoined the operation of the Vesta school. If the pictures actually reflected both the reality of the school and the facts that existed prior to the district court's decision, Respondent's counsel would have surely arranged for such pictures to be taken and placed in the record of the case.[4]

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[4] The lack of merit in Respondent's position is also found in its resort to another outside-of-record and cryptic factual assertion: "not all current students have requested an exemption from the computer curriculum." Resp. Brf. at 7-8.

C. Neither Respondent's policy nor Minnesota statute authorizing ad hoc accommodations prevents Establishment Clause scrutiny.

For the first time, during this litigation Respondent claims to have been acting pursuant to the following policy:

> "Students whose religious convictions oppose dancing or other activities are to be excused, without prejudice, from these activities in any class, activity, or party. When exclusions are requested in required classes or activities, suitable alternative activities shall be provided."

No reference to the policy appears in any document or record relating to the Vesta school prior to this litigation. Likewise, for the first time during this litigation, Respondent claims to have acted pursuant to Minn. Stat. Sec. 126.699, Pet. App. G, even though the statute was not enacted until May, 1993, and not effective until July 1, 1993.

The principle of religious accommodation, whether or not authorized by a policy or statute, is not one without limits. *Board of Ed. of Kiryas Joel v. Grumet*, 512 U.S. 687, 703 (1994). Prior accommodations found acceptable to this Court have allowed religious communities and institutions to pursue their own interest free from governmental regulation. *Id.*, at 705. Accommodations which provide special benefits using religious affiliation as a criteria violate the Establishment Clause. *Id.; Agostini v. Felton*, 117 S.Ct. 1997, 2016 (1997).

Because of the ad hoc nature of the benefit and the total lack of criteria for its application, the policy and the statute relied upon by Respondent do not satisfy the principles laid down by this Court in cases such as *Mueller v. Allen*, 463 U.S. 388 (1983), *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1983), and *Witters v. Wash. Dep't of Servs. For the Blind*, 474 U.S. 481 (1986), for neutral programs providing defined benefits to a broad class. The ad hoc nature of the benefit here leaves no assurance that the next similarly situated group will receive the same benefit, i.e. its own school taught according to its religious precepts, and brings this

case under *Kiryas Joel*. Respondent's blind reliance on the policy and statute ignores the limits on accommodation imposed by the Establishment Clause. By singling out one religious group for a special benefit, i.e. the segregation of its students in a special jointly operated school, located in its home town in a building owned by its leader, taught in accordance with its religious precepts, Respondent has endorsed and advanced the beliefs of the Brethren. These special benefits, provided to no one else on this record, exceed the limits of permissible accommodation, and violate the neutrality principle underlying this Court's Establishment Clause jurisprudence.

CONCLUSION

The Eighth Circuit's decision flies in the face of well-settled Establishment Clause jurisprudence by approving the Respondent's establishment of a special school for one religious sect in order to teach a modified curriculum. The Respondent's attempt to divert the Court's attention from these undisputed facts is an insufficient basis to deny the petition. A writ of certiorari should be granted on this important federal question which has been decided below in conflict with relevant decisions of this Court, and so that the conflicting decisions among the circuits may be resolved.

Respectfully submitted,

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APPENDIX H -- EXCERPTS OF THE DEPOSITION OF VESTA SCHOOL TEACHER JENNY EICHTEN, OCTOBER 12, 1995

Q. Was it your understanding at the time of your interview that technology and media would not be taught in the classroom that you were under consideration for?
A. Yes.

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Q. And were you told by Dr. Bates or anyone else from the school district that you should not use media and technology as part of the curriculum in the Vesta school?
A. That I would not teach it, yes.
Q. And did they say why?
A. It was parent -- or parent request from all of students that they did not wish for their students to participate in computer programming.
Q. Is that the only thing you were told, just about computers? Computers were the only objection?
A. No.
Q. What else?
A. And video tapes would not be used -- they did not want their child to view video tapes.

***

Q. Who did you discuss it with?
A. With Dr. Bates.
Q. And do you recall what he told you about that?
A. That if the student wishes to have computer programming, then transportation will be provided to the Wabasso school building for those students who wish to be involved in that.
Q. But otherwise it would not be provided at the Vesta school, is that right?
A. Correct.
Q. And there would be no use of films or videos at the Vesta school?
A. My job is to educate each child and you can educate a child without using a VCR.

Q. I'm not here to argue with you with that. The question is, did Dr. Bates tell you that you would not be using other things besides computers such as television, VCRs, films?
A. Yes.

***

Q. Calling your attention to page two at the bottom, section 6, the "Use of Technology" of [Pet. App. E], the only thing you had been told -- if I understand your testimony -- prior to starting this school was that those items that are described in section 6 would not be taught; correct?
A. Correct; by me.
Q. And if someone wanted to have them taught, they would have to be bused to the Wabasso building; is that correct?
A. Correct.

***

Q. Do you see the section of subpart five [of Minnesota Rule 3500.1100] that starts, "Media shall be taught in the context of the other required curriculum offerings"?
A. Yes.
Q. And its true, isn't it that media is not being taught in the context of the curriculum in your Vesta classroom?
[Objections]
A. No, it's not.

***

Q. Now, it's true, isn't it, that all of the children who have attended the Vesta building are members of the Brethren?
A. I have not done a religious check, but as far as I know, yes.

***

Q. Do you remember having a discussion with someone identifying themselves as Marcia Neely here maybe more than a year ago calling -- calling you up on the telephone and asking you about what's happening in the Vesta school?
A. Yes.
Q. And did you tell her that all of the children who are attending are Brethren children?
A. As far as my knowledge, they are.
Q. And did you tell her that you had as many students as you could handle at the present time?

A. I can't remember if I told her that.
Q. Well, is that true --
A. Yes.
Q. -- that at that time you had as many children as you could possibly handle?
A. Yes. Yes.
Q. And do you recall telling her that others had been discouraged from attending the Vesta building because you had as many children as you could handle?
A. That's not my decision.
Q. Well, I'm just asking if you may have said that to Marcia Neely in that phone call.
A. I don't remember.
(Appellee's App. below at 45-52)

APPENDIX I – EXCERPTS OF THE DEPOSITION OF VESTA SCHOOL TEACHER AMY ROHLIK, OCTOBER 12, 1995

Q. And during your part-time work you had learned that there was no media or technology used in the school, is that right?

***

A. Yes.
Q. And how did you become aware that it was not used in the school?
A. Well, when you go to the school you don't see computers there, you don't see VCRs there. And I guess she told me that there was an agreement made before this -- before she even started stating that if the children wanted to use computers, that transportation would be provided to the Wabasso building for that purpose.

***

Q. ... Were you aware that all the children belonged to a religious group called the Brethren?
A. Yes, I assumed they were.
Q. And how did you become aware of that?
A. You can tell by the way they dress the girls, and 18 of the 24 have the last name Paskewitz. So its pretty -- guess its just pretty common knowledge over there.

***

Q. And such items such as: computers, movies, videos, television, radio, audio tapes; those are not used in the Vesta classroom, is that right?
A. That's right.
(Appellee's App. below at 73-75)

APPENDIX J -- EXCERPT OF REPORT OF JUNE, 1993 SCHOOL BOARD MEETING

The Wabasso Board of Education has reached agreement with the Vesta Brethren to proceed with plans for a K-6 elementary school at Vesta this fall.

The board approved a motion to 'begin pursuing legal avenues' to try and get the school open this fall.

The Brethren, who sent about a dozen representatives to Monday's board meeting, were also asked to look into how much it would cost to get the former Vesta school building - which they own - remodeled according to current state building, health and safety codes.

If it is legally possible to establish this school, it would be operated without the assistance of modern technology such as computers and video and audio equipment. The reasoning behind this is that the Brethren's religious beliefs prohibit them from using such items, and this has created a conflict in trying to send their children to the public school in Wabasso, which uses such teaching tools and methods.

To eliminate the need to remove these children from the public school environment and teach them at home, the Brethren made the proposal for a second school in Vesta last year.

The school would, according to state guidelines, be open to all students. Because it would be operated by District 640, it is a public school, and can not include religious teachings in the curriculum.

Clayton Paskewitz, who did most of the speaking for the Brethren group at Monday's meeting, said there should be no problems getting the school ready by fall, provided that the school district was committed to operating it.

'There was no point fixing it (the school) up until we got a definite yes or no,' he said.

Current enrollment in the school is projected to be 19 students in grades K-6. Because all 19 students would be taught by a single instructor, in one classroom, it is a similar

arrangement to the 'multi-age' classroom which is being considered for the Wabasso school this fall.

'It's just a matter of getting things worked out,' said board member Gordon Alexander, Vesta.

Board member Tom Franta wanted to know if the Vesta school was a one-year trial proposal.

'We would want a two-or three-year trial period,' Bates said.

'That's the way it should be for any new program,' board member Judy Dahms added.

'As far as dropping the program, unless it just doesn't go... you don't want to do that,' Alexander said.

'We would like to set it up for as long a time as possible,' Paskewitz pointed out. 'We don't see any big problems coming up...we're just asking for as simple a program as possible.'

The board agreed to proceed with the proposal, providing all the legal details could be worked out. A limit of $5,000 on the building remodeling was set; if cost estimates are projected to be higher than that, it will have to be brought back to the board for further consideration."
(Appellee's App. below at 42-43)

APPENDIX K -- LETTER DATED JUNE 1, 1993

June 1, 1993

Dr. George W. Bates, Superintendent
Wabasso High School
Wabasso, Minnesota 56293

Dear Dr. Bates:

Thank you for your letter of May 27, 1993.

Following is a list of pupils from Vesta that are planning to attend the Vesta Public School. Two of our children have moved, bringing the total down to 19.

GRADE	PUPIL	FATHER
K	Karla Paskewitz	Tom Paskewitz
K	Connie Paskewitz	Ron Paskewitz
K	Ken Paskewitz	Herb Paskewitz
1	Kim Paskewitz	Randy Paskewitz
1	Jay Benson	Bruce Benson
2	Tricia Paskewitz	Clayton Paskewitz
2	Chuck Paskewitz	Herb Paskewitz
2	Stuart Paskewitz	Jeff Paskewitz
2	Ryan Paskewitz	Randy Paskewitz
3	Ben Paskewitz	Jeff Paskewitz
3	Sandra Benson	Bruce Benson
3	Roy Paskewitz	Tom Paskewitz
4	Lisa Benson	Bruce Benson
4	Jill Paskewitz	Herb Paskewitz
5	Eddie Paskewitz	Dale Paskewitz
5	Michelle Paskewitz	Jeff Paskewitz
5	Brad Paskewitz	Tom Paskewitz
6	Janella Paskewitz	Clayton Paskewitz
6	Daryl Paskewitz	Herb Paskewitz

Very Respectfully Yours,
(signed)
Lloyd R. Paskewitz

(Appellee's App. below at 41)

APPENDIX L -- EXCERPT OF REPORT OF SCHOOL BOARD MEETING, AUGUST, 1993

Though a few minor language details have yet to be finalized, the Wabasso Board of Education gave its approval Tuesday night to a proposed contract with Lloyd Paskewitz and The Brethren for operation of the Vesta elementary school.

A group of about 35 Brethren members, plus school insurance agents Darrell Baune and Lauree Price, were at the board meeting to discuss concerns with the contract.

****

School board member Judy Dahms asked that the contract include some mention of the school district's hot lunch program, despite the fact that the Brethren children at the school would be taking all of their meals at home.

"What if some kids enroll who are not Brethren?" Dahms asked.

Superintendent George Bates said that the intention was to have Don's Cafe in Vesta cater the meals for those children and deliver them to the school.

"I don't see it as a problem," he said.

"I don't either... I just think it should be addressed," Dahms said.

Because of the enrollment numbers from among The Brethren for the upcoming school year, Bates did not expect this issue to come up, at least until 1994.

"There are going to be 19 students (in grades K-6)," Bates said. "That's the maximum number we can have with just one teacher."

Dahms said she had received several phone calls from parents concerned that the Vesta school would include religious teachings in its curriculum.

"The perception is that this is going to be a parochial school," concurred board chair, Leon Plaetz.

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Provisions were also made in the contract making the Vesta school a limited-technology school, as per Brethren request.

(Appellee's App. below at 54-55)